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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ITEL CORPORATION and FRVR CORPORATION,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a holding company that controls one railroad and wishes to acquire a railroad line from another railroad can evade the requirements of 49 U.S.C. §§ 11343, 11344 and 11347, concerning transactions between railroads and involving control of railroads, and thereby avoid its statutory obligations under 49 U.S.C. § 11347 to employees affected by that acquisition, simply by the device of creating a new subsidiary to acquire the line and later operate it as another railroad subsidiary of the holding company?

2. Whether the Interstate Commerce Commission can treat the holding company's control of the newly-created subsidiary railroad, which must be approved under 49 U.S.C. §§ 11343 and 11344, and which must be subject to obligations for the protection of adversely affected employees under 49 U.S.C. § 11347, as a transaction totally separate from and unrelated to the subsidiary corporation's acquisition of the rail line, where such treatment serves no purpose except to deprive adversely affected employees of the selling railroad of protections mandated by Section 11347?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Railway Labor Executives' Association and the United Transportation Union (collectively referred to herein as "Rail Labor")[1] respectfully request that this Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered on September 14, 1990 in *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. Nos. 88-1793 and 89-1183, and on October 30, 1990

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[1] The Railway Labor Executives' Association ("RLEA") is a voluntary association of the chief executive officers of all of the standard national rail unions in the United States except for the United Transportation Union ("UTU").

in *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. No. 89-1436.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit in Case Nos. 88-1793 and 89-1183 ("*FRVR*") is reported at 914 F.2d 276, and is reprinted as Appendix A hereto at 1a-19a. The decisions of the Interstate Commerce Commission ("ICC") which were the subject of that court of appeals' decision, *Itel Rail Corp. and Itel Corp.—Continuance In Control Exemption—FRVR Corp.*, Finance Docket No. 31206 (served September 12, 1988), and *FRVR Corp.—Acquisition and Operations Exemption—Chicago and North Western Transp. Co.*, Finance Docket No. 31205 (served February 8, 1989), are not reported; those decisions are reprinted at Appendices B and C hereto at 20a-35a and 36a-51a.

The decision of the United States Court of Appeals for the District of Columbia Circuit in case no. 89-1436 ("*B&P*"), is a *per curiam* decision which was based upon that court's prior decision in *FRVR* and it is not reported; the judgment entered by that court is reprinted as Appendix D hereto at 52a. The ICC decision which was the subject of that court of appeals' decision, *Buffalo & Pittsburgh R.R.—Acquisition and Operation of Lines in New York and Pennsylvania, Genessee & Wyoming Indus., Inc., the Aruthur T. Walker Estate Corp. and Dumaines and Buffalo & Pittsburgh R.R.—Exemption Control*, Finance Docket Nos. 31116 and 31117, (served July 10, 1989), is not reported; that decision is reprinted as Appendix E hereto at 54a-83a.

JURISDICTION

The Court of Appeals' decision in *FRVR* was entered on September 14, 1990. Petitioners asked this Court to extend the time in which to file their petition until January 14, 1991. On December 4, 1990, Mr. Chief Justice

Rehnquist granted that request. Sup. Ct. No. A-425. That extension, totaling thirty-two (32) days, is within the time period authorized by 28 U.S.C. 2101(c), and this petition has been filed within that extended time period. The Court of Appeals' decision in *B&P* was entered on October 30, 1990. RLEA has timely petitioned for review of that decision.

In both cases, petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2350.

STATUTES INVOLVED

These cases involve the interpretation and application of several provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101, *et seq.* The provisions at issue are 49 U.S.C. §§ 10505, 10901, 11343, 11344 and 11347. Those provisions are reproduced in full in Appendix F to this Petition at 84a-91a.

STATEMENT OF THE CASE

This petition involves ICC decisions in two cases which, for purposes of the issues presented, are identical in all material respects. At issue are provisions of the ICA governing acquisitions of rail lines and acquisitions of control of rail carriers. Certain transactions involving rail carriers may not be carried out without prior approval and authorization by the ICC under 49 U.S.C. §§ 11343 and 11344. Among such transactions are the purchase of property of one carrier by another carrier, including rail lines (§ 11343(a)(2)), the acquisition of control of two carriers by a person that is not a carrier (§ 11343(a)(4)) and the acquisition of control of a carrier by a person that it not a carrier but that controls carriers (§ 11343(a)(5)). Any transaction which is governed by Section 11343 must be authorized under Section 11344 and is subject to the requirement of Section 11347 that the Commission condition its authorization of such trans-

actions upon provision of arrangements for the protection of adversely affected employees.[2]

Section 10901 of the ICA has been held by various courts of appeals to govern acquisitions of railroad lines by entities which are not carriers. *See e.g., Black v. ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985). Although such transactions are not subject to mandatory employee protective arrangements, the Commission has discretion to impose them. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 105 L. Ed.2d 415, 427 (1989). By its order in *Ex Parte 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*"Ex Parte 392"*), the Commission, pursuant to 49 U.S.C. § 10505, exempted all transactions which are governed by Section 10901 from prior ICC approval, and substituted an expedited procedure whereby such transactions can be consummated shortly after the filing of a notice of exemption. Furthermore, the Commission has stated that it will impose employee protective conditions in such transactions only in what it would consider to be "exceptional circumstances." *Pittsburgh & Lake Erie*, 105 L. Ed.2d at 427-428.

A. The *FRVR* Case

In *FRVR*, the RLEA and the UTU challenged an ICC decision concerning the acquisition by FRVR Corp. ("FRVR") of certain lines of railroad which were owned

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[2] The minimum protective arrangements mandated by Section 11347 include priority in hiring, preservation of collective bargaining rights, employment rights and protection against a worsening of pay and benefits, including compensation for loss of employment or compensation in the form of payment of the differential between what an employee actually earned and what he or she would have earned, but for the transaction. *See e.g., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

by the Chicago and North Western Transportation Co. ("CNW"), a Class I rail carrier which operates a rail system in the midwestern United States. RLEA and UTU also challenged an ICC decision concerning the continued control of FRVR, which was newly formed for the purpose of acquiring CNW's lines, by its corporate parents, Itel Corp. and Itel Rail Corp. ("Itel" and "Itel Rail"), holding companies that already controlled several rail carriers. App. A at 1a, 5a-6a.

The transaction between FRVR and CNW involved FRVR's acquisition of approximately 200 miles of CNW's rail lines, between Green Bay and Milwaukee, Wisconsin. The purchase price for the lines was approximately $61 million; $14 million was provided by an equity contribution from Itel or Itel Rail, and $47 million was provided by a loan secured by the CNW property acquired by FRVR and guaranteed by Itel Rail. App. A at 5a.

When it formed FRVR, Itel Rail already owned several rail carriers including the Green Bay and Western Railroad Company ("GB&W"), which operates over approximately 250 miles of trackage between Green Bay and East Winona, Wisconsin. As a result of FRVR's acquisition of CNW's lines, the two Itel Rail subsidiaries connected at Green Bay, and GB&W could interchange traffic with a corporate affiliate to provide service to Milwaukee. App. A at 5a.

FRVR acquired CNW's lines by invoking the *Ex Parte 392* class exemption of non-carrier acquisitions of rail lines from prior approval under 49 U.S.C. § 10901; the acquisition therefore was not subject to any statutorily mandated requirements for arrangements for the protection of CNW employees affected by the transaction and the ICC refused to exercise its discretion to impose such protections. App. A at 6a. Because FRVR's consummation of its acquisition of CNW's lines would result in Itel and Itel Rail obtaining control of another carrier, the control of FRVR by Itel and Itel Rail was subject to ICC

approval under 49 U.S.C. § 11343(a)(4) and (5). Pursuant to 49 U.S.C. § 10505, the ICC effectively authorized that relationship by exempting it from the prior approval requirements of Sections 11343 and 11344. In accordance with 49 U.S.C. § 10505(g), the ICC stated that the control relationship was subject to employee protective arrangements required by 49 U.S.C. § 11347. However, the Commission held that those protections did not apply to the only employees to be adversely affected in the overall transaction, the employees of the vendor CNW, but were limited to employees of the "Itel system." The ICC reasoned that CNW was not a party to the control proceeding in which the protections were imposed, nor was it a participant in the control relationship. App. A at 6a-7a.

B. The *B&P* Case

In *B&P*, the RLEA challenged an ICC decision concerning the acquisition by the Buffalo and Pittsburgh Railroad Co. ("B&P") of certain lines of railroad owned by CSX Transportation, Inc. ("CSXT"), a Class I rail carrier which operates a rail system throughout the eastern United States. Also, at issue in that case was the continued control of B&P, a corporation newly formed for the purpose of acquiring CSXT's lines, by its holding company parents: Genesse & Wyoming Industries Inc. ("GWI"), which already controlled several rail carriers in New York including the Rochester and Southern Railroad Company ("R&S"), which connects with the lines acquired from CSXT by B&P, as well as a carrier in Louisiana; and the Arthur T. Walker Estate Corporation ("Walker"), which already controlled a rail carrier, the Pittsburgh & Shawmutt Railroad Company ("*P&S*") which also connects with the lines acquired from CSXT by B&P. Walker is, in turn, owned by Dumaines, a New Hampshire trust which also already controlled a rail carrier. App. E at 55a-57a.

B&P acquired 369 miles of CSXT lines between Buffalo, New York and Eidenau, Pennsylvania by exercising a right of first refusal to purchase the northern portion of

those lines which was acquired by GWI in connection with R&S' purchase of CSXT's lines from Rochester to Ashford, N.Y. App. E at 54a-55a, 64a. The price paid for the Buffalo to Eidenau lines was $28.5 million which included $4 million contributed to B&P by GWI and Walker in return for shares in B&P, and the proceeds of a loan secured by all of the assets acquired by B&P (Joint Appendix ("J.A.") in D.C. Cir. No. 89-1436 at 130-131). Under the loan agreement, GWI's and Walker's shares in B&P were pledged to the lender as a condition of the loan to B&P. App. E at 56a; J.A. at 131, 158, 385-86.

PROCEEDINGS BELOW

A. The *FRVR* Decision

In response to FRVR's invocation of the *Ex Parte 392* class exemption for its acquisition of CNW's lines, Rail Labor filed a petition for revocation of that exemption, asserting that because of FRVR's relationship with its corporate parents and affiliates, especially the connecting GB&W, FRVR should have been considered as a carrier and the transaction was subject to regulation under ICA Section 11343 governing sales of lines between carriers. J.A. in D.C. Cir. Nos. 88-1793 and 89-1183 at 668-74.

The ICC denied Rail Labor's petition, concluding that FRVR qualified as a non-carrier under prior Commission precedent which had been affirmed by the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Second Circuit. Those decisions held that the regulatory treatment of a non-carrier affiliate is determined by analyzing: 1) whether there are sufficient indicia of the non-carrier's independence from the affiliated corporation [whether the acquiring entity is a separate corporation, will operate as a common carrier by rail, will publish tariffs and stations, will directly serve the line patrons and will be responsible for financial and contractual obligations in its own name]; and 2) whether

the acquiring entity was formed "exclusively" to elude Section 11343. App. B at 33.

The Commission concluded that, notwithstanding the relationship between FRVR and the Itel corporate family, and notwithstanding FRVR's reliance upon its corporate parents for the funds to acquire and begin operation of the CNW lines, an overlap of officers and directors among the Itel corporations and the connection between the GB&W and the CNW lines, FRVR was sufficiently independent of its parents and affiliates to be treated as a non-carrier under Section 10901 because FRVR would have its "own employees, management and equipment," and would "publish its own tariffs and operate under its own name," and because other than Itel's and Itel Rail's guarantees of the loan to acquire the property, FRVR would be responsible for its own financial obligations. App. B at 32a-33a.

The Commission also rejected Rail Labor's request that employee protective arrangements imposed as a condition of Itel's and Itel Rail's continued control of FRVR be applied to CNW employees affected by the line sale because the two transactions were inextricably linked. J.A. at 48-57. The Commission stated that it had excluded CNW employees from coverage under the protective conditions imposed in the control proceedings because "[t]he control transaction directly affects only employees of carriers in the Itel System. CNW was not a party to the control transaction and its employees are not directly affected by it," and because "[t]he fact that CNW was the vendor in the acquisition transaction provides no basis for granting the relief sought here by Rail Labor." App. B at 23a-24a.

The Court of Appeals affirmed both of the Commission's decisions. The Court held that the Commission's indicia of independence test was based upon a reasonable interpretation of the statute, and that the application of that test in this case was not arbitrary, capricious or contrary

to law. App. A at 11a-16a. The Court also held that the Commission properly concluded that there were "substantial business reasons" for the creation of FRVR to acquire CNW's lines so that it could properly be treated as a non-carrier, despite its use to avoid employee protection obligations. App. A at 17a.

Additionally, the Court of Appeals held that the Commission's exclusion of CNW employees from the protections imposed in the FRVR control decision was consistent with prior precedent that such protections do not extend to employees of non-applicant railroads; and that a determination that non-applicant, non-party carriers are not sufficiently involved in a transaction to trigger employee protective obligations was a reasonable interpretation of the statute. App. A at 9a-10a.

B. *The B&P* Decision

As in *FRVR*, the RLEA argued in *B&P* that because of the relationship between the newly-formed acquiring entity and its corporate affiliates, especially the connecting carriers, the Commission was required to treat B&P's acquisition of CSXT's lines as a sale by a carrier to a system of rail carriers. J.A. in D.C. Cir. No. 89-1436 at 81-82. RLEA again urged that the Commission's indicia of independence test was not sufficient to insure enforcement of the express terms and purposes of Sections 11343 and 11347.

The Commission's initial decision authorizing the continued control of B&P by GWI, Walker and Dumaines specifically stated that the employee protective conditions imposed in that transaction "extends only to railroad employees of the carriers controlled or to be controlled directly or indirectly by GWI, Walker and Dumaines and not to the employees of CSXT." J.A. in D.C. Cir. No. 89-1436 at 42. RLEA filed a petition for reopening and reconsideration of that determination, arguing that application of the protective conditions to the CSXT employees on the lines acquired by B&P was required be-

cause the continued control of B&P by GWI, Walker and Dumaines was inextricably linked to B&P's acquisition of the CSXT lines since there was no need for the control authorization without the acquisition. *Id.* at 45-55.

The Commission's decision in B&P rejected both of RLEA's arguments. With respect to B&P's acquisition of CSXT's lines, the Commission held that, notwithstanding the relationships between B&P and its corporate parents and affiliates, the transaction could be treated as a Section 10901 transaction between a carrier and a "non-carrier" because B&P was a separate legal entity formed, at least in part, to insulate its parents from liability, and B&P would own and operate the line in its own name, publish tariffs, directly serve the line's customers, hire its own employees, have officers and directors named in accordance with State law, be responsible for its own financial and contractual obligations and acquire equipment and material in its own name. App. E at 62a-65a. The Commission also stated that "[n]ot imposing costly employee protective conditions on such transactions enables rail carriers to sell marginally profitable lines to new regional or short line carriers who may operate the lines more economically" and that that policy consideration outweighed the interests of the affected employees. App. E at 67a.

The Commission also rejected RLEA's contention that the protections imposed in its authorization of the control of B&P by GWI, Walker and Dumaines should apply to the CSXT employees affected by the related B&P acquisition of CSXT's lines, citing prior Commission decisions which the majority said held that employee protections do not "extend to employees of carriers not party to the Section 11343 transaction which gave rise to the mandatory protection." App. E at 69a-70a.

The Court of Appeals affirmed the Commission's decision in a *per curiam* decision which cited that court's decision in *FRVR*. App. D at 52a-53a.

REASONS FOR GRANTING THE WRIT

Rail Labor submits that this case involves important questions concerning the interpretation and application of the provisions of the Interstate Commerce Act governing transactions between rail carriers and transactions involving the control of rail carriers. 49 U.S.C. §§ 11341-11347. The ICA was successively amended in 1920, 1933 and 1940 specifically to deal with abuses relating to the acquisition of rail lines and the control of rail carriers through various corporate devices which were employed to evade each prior effort at regulation of such transactions. Because of the importance of those provisions of the ICA to the proper operation of that Act, and to effectuation of the often expressed congressional purpose to regulate such transactions, this Court has several times found it necessary to decide questions concerning the interpretation and application of those provisions.

In a series of decisions issued between 1944 and 1962 concerning former Section 5 of the ICA, predecessor to current ICA Sections 11341-11347,[3] this Court consistently and emphatically held that Congress had required that transactions between rail carriers and corporations which control rail carriers, and especially transactions involving the control of rail carriers, be subject to ICC approval under Section 5. The Court further held that Commission analysis of transactions potentially subject to approval under Section 5 could not be limited or determined by corporate formalities or by the form in which the transactions were presented, but rather must depend upon the true nature and practical effects of those transactions so as to prevent evasion of the requirements of Section 5. *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944); *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 156 (1957); *County of Marin*

[3] The ICA was recodified in 1978 and certain changes were made in the language of those provisions, but Congress specifically stated that such changes were not intended to have substantive effect. P.L. 95-473 § 3, 92 Stat. 1466 (1978).

v. United States, 350 U.S. 412 (1958) and *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

Rail Labor submits that the decisions below are in direct conflict with the above-cited precedent of this Court, for the ICC and the court of appeals have allowed corporations that control rail carriers to use subsidiaries to acquire rail lines from existing carriers to create interlocking, commonly controlled rail systems without ICC approval under Sections §§ 11343 and 11344. Moreover, the ICC and the Court of Appeals have allowed corporations that control carriers to separate ICC authorization of their control of those subsidiaries from ICC authorization of those subsidiaries' acquisitions of rail lines. However, this Court has held that Commission decisions must be determined by the substance rather than the form of the transactions presented to it. Accordingly, the Commission was required to recognize that the acquisitions and the control relationships were inextricably linked, by either treating the acquisitions as Section 11343 transactions between carriers and systems of commonly controlled carriers, or by treating the acquisitions and the control relationships as inseparable parts of single Section 11343 transactions.

As a consequence of the ICC's failure to treat these acquisitions of rail lines as Section 11343 transactions, and the ICC's separation of these acquisitions from its authorization of the control of those entities by corporations which already controlled carriers, rail carrier systems have been allowed to acquire connecting rail lines from other rail carriers without providing arrangements for the protection of employees affected by those acquisitions, despite the clear and unequivocal mandate of Congress, expressed in Section 11347 of the ICA, that employee protective arrangements be imposed in such situations. Section 11347, the successor to prior ICA Section 5(2)(f), is also the product of a long history of congressional regulation of transactions between carriers and involving control of carriers, and represents a deter-

mined effort to protect railroad workers from the adverse employment consequences of such transactions. *See Railway Labor Executives Ass'n v. United States*, 339 U.S. 142, 146-53 (1949).

Because of the increasing frequency of the use of holding companies and subsidiaries to evade ICC regulation under Sections 11341-11347, because of this Court's consistent recognition of the importance of proper interpretation and application of those provisions of the ICA, and because of the significant impact of such continuing abuse of the ICA, Rail Labor submits that the Court should grant this petition to review and vacate the Court of Appeals' decisions.

I. THE COURT OF APPEALS' DECISIONS CONFLICT WITH LONG ESTABLISHED PRECEDENT OF COURT

This Court has consistently held that ICC analysis and oversight of transactions subject to Section 11343 may not be evaded or limited by the use of holding companies or subsidiary corporations, and that ICC regulation of a transaction may not be determined by the form in which a transaction is presented to the Commission.

In *United States v. Marshall Transport Co.*, *supra*, the Court held that where a subsidiary of a corporation which controlled a carrier acquired the property of another carrier, the acquisition involved the parent corporation's acquisition of control of the vendor carrier, so that the Commission could not consider the propriety of the acquisition in the absence of the parent corporation's application for authority to acquire control of the property of the vendor carrier. 322 U.S. at 32, 35-37, 41-42. The Court specifically rejected the argument that it was sufficient that the subsidiary corporation had sought ICC approval of the transaction.

The decision in *Marshall Transport* was relied upon in *Allegheny Corp. v. Breswick Co.*, *supra*, in which the

Court held that the merger of one railroad, which was indirectly controlled by a holding company, into another railroad which was controlled by the same holding company was subject to ICC approval under Section 5 because the holding company would be obtaining increased control over the indirectly controlled carrier by its merger into the other controlled carrier. That the holding company exercised control over the two carriers through various subsidiaries, and that it already exercised some control over both carriers, did not vitiate the need for ICC approval of the acquisition of control through merger because "[n]ot labels but the nature of the changed relations is crucial in determining whether a rearrangement within a railroad system constitutes an acquisition of control under § 5(2)." 353 U.S. at 166, 169-170. The Court further stated that:

> . . . a non-carrier may not "gain control" over carriers free of Commission regulation merely by operating through subsidiaries. The crux of each inquiry to determine whether there has been an "acquisition of control" is the nature of the change in relations between the companies whose proposed transaction is before the Commission . . . This is the issue and not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the Marshall Transport Case, the parent can always, by operating through subsidiaries, make itself more remote.

Id. at 169.

In *County of Marin v. U.S.*, *supra*, the Court held that the ICC erroneously assumed jurisdiction under Section 5(2) of a motor carrier's transfer of its intrastate operations to a newly-formed, wholly-owned, subsidiary which was designed to avoid certain state regulation of the original company's intrastate operations. The Court rejected the Commission's view that the transaction involved the parent corporation's acquisition of control of the newly-formed subsidiary which would have

been subject to Commission approval under Section 5(2), again noting that the applicability of Section 5(2) depended upon "the nature of the changed relation between the companies." 336 U.S. at 419, *quoting Allegheny Corp. v. Breswick & Co.* Applying that standard, the Court concluded that the transfer of operating rights did not involve acquisition of control of a carrier since the subsidiary was "a mere corporate shell without property or function, [which] can by no stretch of the imagination be deemed a carrier," and since, even considering the circumstances after the transaction was consummated and [the newly-formed subsidiary] became a carrier, "the alleged 'acquisition' amounts to little more than a paper transaction. In reality the carriers propose a split-up something beyond the purpose and language of § 5(2)(a)." *Id.* at 418.

In *Gilbertville Trucking Co. v. United States, supra*, the Court affirmed the ICC's disapproval of a proposed merger of two carriers because it had found that the two carriers had previously been commonly controlled without prior ICC approval. The Court described the importance Congress attached to the regulation of acquisitions of control of carriers and Congress' persistent efforts to insure adequate regulation of all aspects of control transactions. Thus, the Court stated that Section 5 of the ICA was a "comprehensive legislative scheme designed to place ownership, management and operational control over common carriers within the regulatory jurisdiction of the Commission," and that Section 5 had been amended in 1940 to "reach[] the elaborate corporate devices used to centralize control over the railroads 'without Commission supervision and in defiance of the will of Congress.'" The Court further noted that "[a]lthough Congress had intended the Transportation Act of 1920 to provide complete supervision, the Act proved inadequate to reach the holding company system." 371 U.S. at 124-125 (footnotes to Committee Reports and Hearings on the 1940 Act omitted).

The common thread in those decisions is the Court's repeated admonition that ICC oversight of transactions involving rail carriers must be determined by the "actualities of intercorporate relationships" (*Marshall Transport*, 322 U.S. at 38) and by the "nature of the proposed transaction itself" (*Allegheny v. Breswick*, 353 U.S. at 169). The Court also consistently recognized the importance of vigilant ICC scrutiny of the use of holding companies and subsidiary corporations to affect the outcome of ICC regulation.

The relevance of those decisions to the instant cases is not diminished by differences in the facts. In those decisions, this Court was dealing not only with specific forms of manipulation of ICC regulation, but also with the manner in which regulation of transactions between carriers, or involving control of carriers, must be performed, and specifically, all forms of acquisitions of control of rail carriers. *See, e.g., Gilbertville Trucking*, 371 U.S. at 125. Thus, the fact that *Marshall Transport* involved acquisition of control of an entire carrier, whereas the instant cases involve acquisitions of parts of carriers which would become separate carriers, does not diminish that decision's applicability to the instant cases. The rationale for the Court's holding that a corporation which controls a carrier may not obtain control over another carrier by obtaining its railroad property without ICC approval under Section 5 certainly applies where part of a carrier's railroad property is being acquired in order to form a new carrier, since the end result of both types of transactions is the acquisition of control of an additional carrier by a corporation which already controls a carrier. As the Court stated in *Marshall Transport*, the statute is "concerned not merely with the acquisition of control of one corporation by another but with the acquisition of control of a corporation which is doing the business of a carrier." 322 U.S. at 39.

Similarly, the fact that *County of Marin* involved an attempt to describe as a carrier a newly-formed subsidiary of a carrier in order to invoke ICC jurisdiction under Section 5 does not render that decision inapplicable here, where corporations which control carriers have attempted to evade ICC approval of their acquisitions of control over additional rail lines under Sections 11343 and 11344 by formation of new subsidiaries described as non-carriers. The basis for the decision in *County of Marin* was that the newly-formed subsidiary could not be considered to be separate from its parent such that the transaction between them was not a transaction under Section 5. Under that reasoning, an acquisition of rail lines by a newly-formed subsidiary of a corporation must be considered an acquisition by the corporation, since the transaction to be regulated under the ICA is not the relationship between the parent and the new subsidiary, but the acquisition of control of a carrier through the formation and use of the subsidiary to acquire rail lines. Thus, *Marshall Transport* and its progeny extend beyond their specific facts and enunciate basic principles concerning interpretation of Sections 11343 and 11344 which are applicable in these cases.

The force of the *Marshall Transport* line of cases also has not been affected by deregulation of the railroad industry. Those decisions have never been overruled or limited. Furthermore, neither the 1976 nor the 1980 amendments to the ICA altered Sections 11341-11347 in any way which would diminish the force of those decisions, or which would indicate that Congress intended Section 11343 and the Section 11344 authorization processes to be read narrowly rather than broadly, so that transactions formerly subject to Section 5 could be accomplished under some other section of the statute. Nor can such an intention be inferred from Congress' efforts to streamline the regulatory process; a desire to streamline the *process* of regulation does not suggest a desire to remove a matter from statutory jurisdiction.

Accordingly, the Commission was bound by the holdings of this Court in the *Marshall Transport* line of cases.

The "actualities of intercorporate relationships" and the true nature of the transactions involved in these cases demonstrate that the acquisitions of rail lines by FRVR and B&P were effectively single Section 11343 transactions, completed in two steps, whereby rail lines were sold by carriers to systems of carriers. This is evident not only from the extremely close control and shared management of the commonly controlled corporations, and by the complete dependence of the subsidiaries upon their parents for the financing necessary to actually effect the acquisitions, but also by the physical connections between the newly-formed entities and their affiliates. Accordingly, the Commission's treatment of the acquisitions and the control authorizations as entirely separate transactions, its conclusion that the acquisitions could be treated as non-carrier acquisitions and its conclusion that the selling carirers were not involved in the control transactions were in direct conflict with *Marshall Transport* and its progeny. Furthermore, the Commission's deviation from this Court's precedent was compounded by its violation of Section 11347, since the employees who worked on the transferred lines were denied protections which were required by Section 11347 because of the linkage between the acquisitions and the control relationships.

In its acquisition decisions, the Commission allowed superficial indications of separation between newly-formed subsidiaries and their affiliates and parents, as well as the manner in which transactions were presented, to determine the outcome of regulation. The Commission determined that the FRVR-CNW and B&P-CSXT transactions were not carrier acquisitions of rail lines from carriers because FRVR and B&P were separate legal entities from their parents and affiliates, and because after being capitalized and guaranteed by their parents for the loans utilized in the acquisitions of their railroad businesses, FRVR and B&P were responsible for their

own day to day obligations and were held out as separate entities for the purpose of limiting any potential liability to their parents and affiliates. App. A at 13-15, App. C at 7-8, App. D at 8-9.

By focusing on these superficial indications of independence the Commission failed to attach significance to the facts that FRVR and B&P were formed by corporations which already controlled carriers exclusively for the purposes of acquiring the lines of existing rail carriers which connected to existing subsidiary carriers, their parent corporations provided the capital for the acquisitions and guaranteed the loans used by the newly-formed corporations to acquire their rail property, the lines that they acquired provided their affiliates with access to major markets (GB&W to Milwaukee and R&S and P&S to Pittsburgh) through interchange with corporate relatives, the connections between the new and old subsidiaries allowed joint marketing, joint routing and sharing of equipment and the subsidiaries shared officers and management.[4] When all of these facts are considered in light of the requirement that the Commission must consider the actualities of the intercorporate relationships and the true nature and practical effects of these transactions, it is clear that although FRVR and B&P were technically separate entities from their parents and affiliates, their acquisitions of CNW's and CSTX's rail lines were actually sales of rail lines by carriers to systems of carriers under Section 11343.[5]

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[4] Rail Labor does not contend that a connection between a newly-formed corporation and an affiliate is necessary for the new corporation to be treated as a carrier, but Rail Labor does contend that such a connection is a compelling reason for treatment of the new corporation as a carrier.

[5] That FRVR and B&P were lawfully incorporated and are distinct corporations for purposes of state law, as well as for limitation of liability of their parent companies, cannot justify the ICC's refusal to treat them as carriers under the ICA because of their relationships with their parents and affiliates. This Court has consistently

Thus, by treating the FRVR-CNW and B&P-CSXT transactions as non-carrier acquisitions under Section 10901, the ICC allowed the corporate parents of FRVR and B&P to form interlocking rail systems by piecing together the rail lines of controlled subsidiaries without ICC approval of their acquisitions of control over additional carriers under Sections 11343 and 11344.[6] Furthermore, by allowing this manipulation of its processes, the Commission allowed these transactions to be consummated without the employee protective arrangements which Congress has explicitly required to be imposed in Section 11343 transactions to mitigate the effects of these transactions upon employees. Thus, the Commission's decisions in the acquisition cases conflicted with the requirements of *Marshall Transport* and its progeny, and that departure from this Court's precedent resulted in violations of Sections 11343 and 11347.

In the control decisions, the Commission ignored the requirements of *Marshall Transport* and its progeny by holding that the control transactions involved only the commonly controlled corporations and did not involve the acquisitions of rail lines. However, the only reason that ICC authorization of the control transactions was necessary was because the new subsidiaries were acquiring

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held that the outcome of Federal regulation may not be determined by corporate formalities, however valid they may be under state law. *County of Marin, supra, Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938), *Anderson v. Abbott*, 321 U.S. 349, 363 (1943); *cf. Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

[6] Although it has never done so previously, the Commission may argue that it did consider these transactions as involving the acquisition of control of rail lines because it authorized the continued control of FRVR and B&P by their parents after they began operations. However, such a contention would be inconsistent with the Commission's holdings in those decisions that employees of CNW and CSXT were not covered by the employee protections imposed in the control decisions because the acquisitions involved different issues than the control decisions and the control relationships affected only employees of the commonly controlled carriers. App. C at 3; App. D at 9.

rail lines and would become carriers. As the Court observed in *Marshall Transport*, the ICA is concerned not with control of corporations but with control of carriers. 322 U.S. at 39. And, as in *County of Marin*, there would have been no ICA control transactions if these cases involved only the parent corporations' acquisition of control over newly formed subsidiaries.

Thus, ICC authorization of the control relationships was required only because the subsidiaries were acquiring lines of a railroad and were becoming rail carriers so that the parent corporations were acquiring control over additional rail carriers. Indeed, the ICC itself stated that its authorization of the control relationship was necessary because the subsidiaries would become carriers. *FRVR* J.A. at 40; *B&P* J.A. at 41. Furthermore, because of the necessity for the capital contributions and the guaranteeing of the loans to the new subsidiaries by their parents, the acquisitions were entirely dependent on the intercorporate relationships. Therefore, by failing to recognize the linkage between the acquisitions and the control relationships, and by limiting the scope of the statutorily mandated employee protective arrangements to employees of the commonly controlled carriers, the Commission ignored the true scope of these transactions. Additionally, the Commission violated the express requirement of Section 11347 that it require the provision of arrangements to protect employees of carriers which are "involved" in Section 11343 transactions.

Ultimately, regardless of how the Commission explains its control decisions, it cannot demonstrate that it has applied the Act in compliance with the precedent of this Court and in a manner consistent with the express requirements of the Act. If a carrier selling rail lines to a newly-formed, controlled entity is not involved in the proceeding concerning the control of that acquiring entity, it cannot be said that the Commission has actually authorized the parent corporation's acquisition of control

of an additional rail operation. Conversely, if it is said that the Commission's authorization of the control of the acquiring entity implicitly considered the propriety of the parent corporation's acquisition of an additional railroad operation, it cannot be said that the vendor in the line sale is not "involved" in the control decision within the meaning of 49 U.S.C. § 11347; and the employee protections imposed in the control decision pursuant to that Section must apply to the employees of the vendor because of its involvement in that transaction.

The Commission's conclusions that CNW and CSXT employees were not involved in the control transactions because CNW and CSXT were not parties to the control proceedings were based upon decisions in merger cases which restricted the employee protective arrangements imposed in those mergers to employees of parties to the mergers and excluded employees of the competitors of the merging carriers.[7] However, those decisions do not support the ICC's decisions in the control cases that CNW and CSXT were not "involved" in the control transactions within the meaning of Section 11347. A determination that competitors of merging carriers are not involved in a merger does not support a conclusion that employees of railroads which are selling rail lines to commonly controlled carriers are not involved in the Commission's authorizations of the control relationships upon which the acquisitions depend. Moreover, Rail Labor respectfully submits that the decisions in the merger cases improperly vitiated the requirement of the first sentence of Section 11347, which provides that protections must be imposed for the benefit of employees of *a* rail

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[7] *Burlington Northern, Inc.—Control & Merger—St. Louis San Fran. Ry.*, 360 I.C.C. 784 (1980), *aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 411 U.S. 1017 (1981); *Guilford Transportation Industries, Inc.—Control B&M Corp.*, 366 I.C.C. 292 (1982), *aff'd sub nom. Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983) and *Crounse Corp. v. ICC*, 781 F.2d 1176-1193 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986).

carrier "involved" in a transaction, by limiting the scope of that requirement because the second sentence of Section 11347 refers in the singular to protective arrangements made by "*the* rail carrier" and the "authorized representative of *its* employees"; *see* App. A at 9-10, *quoting Lamoille Valley R.R., supra.*

The language cited by the ICC and the court of appeals became part of the statute in the 1978 recodification of the ICA, in which former Section 5(2)(f) became Section 11347. Section 5(2)(f) did not utilize singular forms when discussing arrangements implementing the protective conditions; rather Section 5(2)(f) referred to the carrier *or carriers* and to the representative *or* representatives of its or *their* employees.[8] Since the 1978 recodification was intended to "restate, without substantive change" the prior version of the ICA, and since the recodification "may not be construed as making a substantive change in the laws replaced" (Pub. L. 95-473 § 3(a), 92 Stat. 1466, October 17, 1978), the Commission was simply wrong in inferring from the language of the second sentence of Section 11347, an intention of Congress to restrict its scope to the employees of the carriers which are parties in the proceeding in which protections were imposed.[9] Accordingly, the precedent relied upon by the

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[8] Section 5(2)(f) provided that as a condition of its approval of a covered transaction "involving a *carrier or carriers* by railroad . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. . . . Notwithstanding any other provisions of this subchapter . . ., an agreement pertaining to the protection of the interests of employees may hereafter be entered into by a *carrier or carriers* by railroad and the duly authorized *representative or representatives* of *its or their* employees." (emphasis added). 41 Stat. at 456 (1940).

[9] Rail Labor does not here challenge the decisions in the merger cases. Whether competitor carriers are involved in a merger is a far different question from whether a carrier selling a line of railroad to a controlled entity is involved in the control transaction upon which the acquisition depends.

Commission does not support its restriction of the scope of the protections imposed in the control cases.[10] Moreover, Rail Labor submits that the ICC's reliance upon the revised language of Section 11347 to significantly alter the meaning of that section provides an additional reason for granting this petition because of its abuse of the recodification process.

The court of appeals' decisions in these cases relied heavily upon the principle that reviewing courts must defer to agency interpretations of statutes when the statutes are silent or ambiguous. App. A at 8, *citing Chevron USA, Inc. v. NRDC Inc.*, 467 U.S. 837, 843 and 11 (1984). However, in *Chevron* this Court also stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." *Id.* at 853 n.9 (*citations omitted*). And in *County of Marin*, *supra*, the Court stated that "[w]hile the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive." 356 U.S. at 420, *citing United States v. Missouri Pac. R.R.*, 278 U.S. 269, 280 (1929). In *Marshall Transport* and its progeny, this Court repeatedly explained what Congress intended with respect to ICC regulation of transactions between carriers and involving the control of carriers, especially when such transactions involved holding companies and subsidiaries. Indeed, it was because of this repeated and clear explication of the purposes of the statute that this Court re-

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[10] Indeed, as Rail Labor argued below, until recently, the ICC had held that a carrier need not be a party in order to be "involved" in a transaction within the meaning of Section 11347 and that where two transactions are parts of an "inseparable plan" employee protections imposed in one transaction are applicable to employees who are affected by the related transaction. Rail Labor submits that because Section 11347 requires the ICC to impose protective arrangements at least as protective as those imposed in 1976, the ICC's failure to apply that precedent in these cases violated § 11347.

versed the ICC's decision in *County of Marin*. Rail Labor respectfully submits that, as in *County of Marin*, the Court should not defer to the ICC's construction of the statute in these cases because of the ICC's blatant disregard for the language and purpose of the statute as explained by this Court, and because the ICC's failure to abide by applicable precedent of this Court has allowed the evasion of the express congressional mandate for imposition of employee protective arrangements in cases such as these. Rail Labor further submits that review of the decision below is therefore appropriate and necessary.

II. BECAUSE THESE CASES INVOLVE AN ISSUE IMPORTANT TO THE ENTIRE RAILROAD INDUSTRY, THE COURT SHOULD GRANT THIS PETITION TO AGAIN CLARIFY THE REQUIREMENTS OF THE ICA CONCERNING TRANSACTIONS BETWEEN RAIL CARRIERS AND INVOLVING CONTROL OF RAIL CARRIERS TO REQUIRE THAT THE ICC INSURE FULL COMPLIANCE WITH THOSE REQUIREMENTS

The Court has several times found it necessary to address the proper interpretation of Sections 11343 and 11344 of the ICA because of the importance of those provisions to that statute, and because of an historic pattern of efforts to evade or manipulate regulation under those provisions through the use of holding companies and subsidiary corporations. Rail Labor respectfully submits that it is again necessary for the Court to address that question because the decisions below demonstrate that the Court is again faced with efforts to evade and manipulate regulation under Sections 11343 and 11344.

The need for review of these decisions is amplified by the fact that the ICC has countenanced these abuses of the statute based upon a policy determination that imposition of employee protective arrangements would discourage sales of "marginally profitable" rail lines. App. E at 67a. However, as is discussed above, the ICA does not allow the Commission to treat a Section 11343 trans-

action as a Section 10901 transaction because that agency feels that the cost of employee protection would inhibit what it might perceive to be a desirable transaction. Rather, the statute requires that particular types of transactions be authorized under Sections 11343 and 11344 and that such transactions must be conditioned upon provision of arrangements for the protection of employees of carriers involved in those transactions; and this court has repeatedly held that the scope of Sections 11343 and 11344 must be construed broadly. Furthermore, the ICA has not been amended to narrow the scope of Section 11343, 11344 or 11347, or to vitiate the force of this Court's decisions concerning those provisions. Thus, the ICC's effort to advance its own policy objectives without regard for the requirements of the statute and the precedents established by this Court necessitate review of the decisions below.[11]

The ICC has provided additional impetus for review of the decisions in the instant cases by its conflicting applications of the statute in similar situations. In two recent decisions the ICC has authorized, under Section 11343, acquisitions of rail lines by newly-formed subsidiaries of a corporation which controls carriers in circumstances virtually identical to the instant cases, based upon the subsidiaries' parent's willingness to allow the subsidiaries to be treated as carriers. *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line Between Kansas City, Mo. and Chicago, Ill.*, Finance Docket No. 31505 Decision No. 6 (served November 15, 1989) (unreported); *Rio Grande Indus., Inc.—Purchase and Track-*

[11] Rail Labor submits that the ICC's general policy of encouraging new entrants to the railroad industry (*see Black v. ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985), is not involved in these cases since the issue here concerns whether FRVR and B&P can be considered new entrants, given that they are completely controlled by corporations which already control carriers and that the lines they acquired connect with the lines of corporate affiliates which are existing carriers. Thus, whatever the merits of that policy may be, they are irrelevant to any issue in these cases.

age Rights—Chicago, Missouri & Western Ry. Co., 5 I.C.C.2d 952 (1989). In both cases the Commission rejected claims that, under the indicia of independence test applied in the instant cases, the newly-formed subsidiaries were required to be treated as non-carriers so the transactions were subject to authorization under Section 10901. Thus, in *Rio Grande Industries—Chicago, Missouri and Western*, the ICC stated that "[a]pplicants having filed under § 11343 and therefore having conceded carrier status; they are entitled to judgment on the transaction accordingly." 5 I.C.C.2d at 967 n.15; *see also Rio Grande Industries—Soo Line* at 4-5.

Another example of the ICC's inconsistent handling of acquisitions of rail lines by newly-formed subsidiaries of corporations which control carriers is the currently pending case, *Chesapeake and Albemarle R.R., Inc.—Lease Acquisition and Operation Exemption—Southern Ry.*, Finance Docket No. 31617. There, an existing carrier which was a subsidiary of a holding company sought to acquire a rail line from a carrier pursuant to Section 11343. Sometime after the filing of the Section 11343 application, the carrier subsidiary withdrew its application and a newly-formed subsidiary of the same holding company effected the acquisition of the same rail line under the same agreement pursuant to Section 10901 and an *Ex Parte 392* exemption. The asserted reason for the change in the acquiring subsidiary was a claim that delays in processing of the Section 11343 application necessitated the change to an acquiring entity that could take advantage of the *Ex Parte 392* class exemption, which allowed almost immediate consummation. Moreover, the new subsidiary's parent corporation exercised control of the new carrier without any ICA authority. In contrast to *Gilbertville Trucking Co., supra*, where the Commission itself rejected a merger because of prior unauthorized control, in *Chesapeake and Albemarle* the Commission has taken no action to enforce the provisions of Section 11343 dealing with control of carriers. Rail Labor

has challenged this transaction as both an improper use of Section 10901 and an unlawful acquisition of control of a carrier. In view of these several recent transactions, it is apparent that the ICC's application of the statute in cases such as these depends upon the preferences of the applicants, and not upon a principled analysis of the statute. The ICC's inconsistent interpretation of the statute accentuates the need for this Court's review of the decisions below to clarify the manner in which these transactions are to be regulated.

Rail Labor submits that it is necessary for the Court to address these questions in the current cases because they do not represent isolated abuses of the statute but continuing industry practice through which holding companies are acquiring lines of railroad to create interlocking systems without Commission authorization for their acquisition of control over those lines. As is noted above, GWI initially obtained control of an additional line of railroad, the R&S, which was several times the size of its existing carriers and which connected with those carriers through the same procedures as were utilized in the instant cases; GWI then allowed B&P to exercise a right of first refusal obtained in the R&S transaction in order to acquire the lines which connected with the R&S. Under the Commission's decisions in these cases GWI could connect its New York and Louisiana railroads through acquisitions by newly-formed subsidiaries without ever having the acquisition of control of the components of such a system reviewed under Section 11343. Indeed, acquisition of control of a large scale system was obtained by this method in *Southeastern Rail Corp.—Acquisition and Operation Exemption—Gulf and Mississippi R.R.*, Finance Docket No. 31187 (served August 31, 1989), *aff'd sub nom. BLE v. ICC*, 909 F.2d 909 (6th Cir. 1990), and *MidSouth Corp. Continuance In Control Exemption—Southeastern Rail Corp.*, Finance Docket No. 31186 (served February 12, 1988), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 869 F.2d 1492

(6th Cir. 1989) (Table). In that transaction, the Mid-South Corporation utilized a newly-formed subsidiary to acquire railroad lines which connected with its existing subsidiary carriers to form an interlocking system of over 1200 miles with combined revenue of a Class II carrier; this acquisition of control of these new lines was accomplished without ICC authorization under Section 11343. Thus, the instant cases do not involve isolated problems but represent growing practice in the industry which will affect large numbers of employees and many communities and shippers throughout the nation.

Rail Labor seeks this Court's review of the decisions below because these manipulations of the ICA, which mirror those which this Court has previously rebuffed, have resulted in the denial of employee protective benefits which Congress specifically mandated in transactions like those at issue here. However, Rail Labor also submits that the decisions below have consequences beyond the interests of the employees who have been unlawfully denied benefits. As is demonstrated above, the manipulation of the statute and evasion of regulation through the use of holding companies and subsidiary corporations has a long history and Congress has consistently sought to structure the statute to ensure that transactions between rail carriers and acquisitions of control of rail carriers will be subject to ICC approval under the standards set forth in 49 U.S.C. § 11344. In doing so, Congress was concerned not just with the interests of rail employees but also with the interests of all who depend upon rail transportation.

If the ICC allows transactions between rail carriers and acquisitions of control of rail carriers to be accomplished without compliance with Section 11344, in order to relieve the participants in those transactions of their obligations under Section 11347, the entire congressional purpose in regulation of such transactions will also be defeated. In evading Section 11347, the participants in

those transactions will be evading examination under Section 11344, which requires ICC consideration of the financial viability of applicants. While the failures of individual carriers which have begun operations under *Ex Parte 392* exemptions will present difficulties, failures of entire systems which have been pieced together through *Ex Parte 392* exemptions will obviously have more serious consequences. Accordingly, Rail Labor respectfully submits that the Court should grant this petition to ensure, as it has done in the past, that the ICA is interpreted and applied in the manner intended by Congress.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and vacate the judgments of that court in *Railway Labor Executives' Ass'n and United Transportation Union v. ICC*, *supra*, and *Railway Labor Executives Ass'n v. ICC*, *supra*.

Respectfully submitted,

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90-1127

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ITEL CORPORATION and FRVR CORPORATION,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 15, 1990 Decided September 14, 1990

Nos. 88-1793 & 89-1183

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents

CHICAGO AND NORTHWESTERN TRANSPORTATION CO., ITEL CORP., FRVR CORP.,
Intervenors

Petitions for Review of Orders of the Interstate Commerce Commission

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Richard S. Edelman, with whom *William G. Mahoney* and *John O'B. Clarke, Jr.* were on the brief, for petitioner in both cases.

Clyde J. Hart, Jr., Attorney, Interstate Commerce Commission ("ICC"), with whom *Robert S. Burk*, General Counsel, *Henri F. Rush*, Deputy General Counsel, ICC, *James F. Rill*, Assistant Attorney General, *John J. Powers III*, and *Robert J. Wiggers*, Attorneys, Department of Justice, were on the brief, for respondents in

both cases. *John J. McCarthy*, Attorney, ICC, also entered an appearance for respondents.

Fritz R. Kahn, with whom *Russell E. Pommer*, *Stuart F. Gassner*, *Myles L. Tobin*, and *Ralph J. Moore, Jr.* (for Chicago and North Western Transportation Co.), and *John M. Nannes*, *Carl V. Lyon*, and *Stephen M. Olson* (for Itel Corp. and Itel Rail Corp.) were on intervenors' joint brief, argued on behalf of intervenors in No. 88-1793.

John M. Nannes, with whom *Carl V. Lyon* and *Stephen M. Olson* (for FRVR Corp.) and *Fritz R. Kahn*, *Russell E. Pommer*, *Stuart F. Gassner*, *Myles L. Tobin*, and *Ralph J. Moore, Jr.* (for Chicago and North Western Transportation Co.) were on intervenors' joint brief, argued on behalf of intervenors in No. 89-1183.

L. John Osborn also entered an appearance for intervenor Chicago and North Western Transportation Co.

Before BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: In these related cases, the Railway Labor Executives' Association and the United Transportation Union (collectively, "RLEA") seek review of two decisions of the Interstate Commerce Commission concerning, first, the FRVR Corporation's acquisition of certain rail lines from the Chicago and North Western Transportation Company ("CNW") and, second, the continued control of FRVR by Itel Rail Corporation and its parent, Itel Corporation. The effect of these decisions was to deny the imposition of labor protection conditions for the benefit of CNW's employees. The RLEA contends that the transactions were structured deliberately to evade employee protection, and that the ICC should have looked to the "true nature" of the transactions and disregarded certain "formalities of corporate

structure." We conclude that the ICC's interpretation of the relevant statutes was permissible and that their application to the facts of these cases is consistent with the agency's own prior decisions and supported by circuit precedent.

I. Background

A. Statutory Background

Section 10901 of the Interstate Commerce Act has been held to require the ICC's approval of the acquisition or operation of a rail line by an entity that is not a rail carrier. *See* 49 U.S.C. § 10901 (1982); *Black v. ICC*, 762 F.2d 106, 111, 115 (D.C. Cir. 1985); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Under section 10901, the Commission must find "that the present or future public convenience and necessity require or permit" the acquisition and operation of the line. 49 U.S.C. § 10901(a). Section 10901(e) gives the Commission the discretion to impose certain protective conditions for affected employees. *Id.* § 10901(e). The Commission has generally refrained from imposing labor protection in section 10901 cases unless exceptional circumstances are shown, and we have upheld the Commission's exercise of that discretion. *See, e.g., Black*, 762 F.2d at 116-17.

A different section of the Act, section 11343, governs certain transactions involving two or more rail carriers. 49 U.S.C. § 11343 (1982). As relevant here, section 11343 requires the ICC's prior approval and authorization for the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers." 49 U.S.C. § 11343(a)(5).

Any transaction governed by section 11343 is also subject to the labor protection requirements of section 11347, which provides in relevant part as follows:

> When a rail carrier is involved in a transaction for which approval is sought [pursuant to § 11343],

> the Interstate Commerce Commission *shall* require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as [terms previously imposed by statute]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees . . . .

49 U.S.C. § 11347 (emphasis added). Thus, for transactions uner section 11343, employee protection is mandatory, while under section 10901, it is discretionary. The statutory minimum employee protective arrangements mandated by section 11347 are extensive and include preservation of collective bargaining rights, reemployment rights, severance pay, continuation of fringe benefits, and the like. *See, e.g., New York Dock Ky. v. United States*, 609 F.2d 83 (2d Cir. 1979).

The final provision relevant here in section 10505, under which the ICC is obliged to exempt from prior approval requirements "a person, class of persons, or a transaction or service" if certain findings are made, primarily that regulation "is not necessary ot carry out the transportation policy of" the Interstate Commerce Act. 49 U.S.C. § 10505(a) (1982). Such an exemption, however, may not operate to "relieve a carrier of its obligation to protect the interests of employees as required by" the Interstate Commerce Act. *Id.* § 10505(g).

B. Factual and Procedural Background

Itel Rail Corporation, a subsidiary of Itel Corporation, directly and indirectly controls several rail carriers. The FRVR Corporation, a wholly owned subsidiary of Itel Rail, was formed in 1987 as the vehicle for the rail lines described below. Prior to that acquisition, FRVR had not engaged in any rail operations and was not subject to ICC regulation.

In 1987, FRVR entered into an agreement to purchase the Duck Creek South lines, consisting of about 200

miles of line and incidental trackage rights located between Green Bay and Milwaukee, Wisconsin, from the Chicago and North Western Transportation Company. These are essentially feeder lines for CNW as well as several other railroads; they compete with both motor carriers and a rail carrier. The purchase price was approximately $61 million, of which $14 million was provided by an equity contribution from Itel or Itel Rail, and $47 million by a loan secured by the acquired assets and guaranteed by Itel Rail.

Among Itel Rail's other subsidiaries is the Green Bay & Western Railroad Company ("GB&W"), which operates some 250 miles of track running across the state of Wisconsin between East Winona and Green Bay. As a result of FRVR's purchase of the Duck Creek South lines, FRVR and GB&W will connect at Green Bay, and this connection will permit GB&W to interchange traffic with CNW at Milwaukee.

Although it is a subsidiary of Itel Rail, FRVR has its own employees, management, and equipment, and it publishes its own tariffs and operates under its own name. One of FRVR's officers and directors is an officer of Itel Rail, and another, an employee. The remaining officers and directors were formerly associated with GB&W. None of the FRVR officers or directors is an officer or director of Itel.

As a non-carrier acquiring a rail line, FRVR was required pursuant to section 10901 to obtain ICC approval of the Duck Creek South purchase, unless it could secure an exemption from the requirement under section 10505. On December 23, 1987, FRVR and CNW applied for the exemption, which automatically became effective under certain class-wide procedures established by the Commission.

In subsequent proceedings, the RLEA challenged FRVR's exemption from prior ICC approval under sec-

tion 10901, arguing that section 10901 was not applicable to the Duck Creek transaction. The RLEA asserted that FRVR should not have been considered a non-carrier because it was formed for the primary purpose of avoiding the imposition of employee protection under sections 11343 and 11347 and because it was not sufficiently independent of Itel Rail and its subsidiaries, particularly GB&W. The RLEA thus urged that the Commission disregard the "formalities of corporate structure," revoke the exemption, and proceed instead under section 11343, which would trigger the mandatory employee protection under section 11347.

On February 21, 1989, the Commission denied the RLEA's petition for revocation of FRVR's exemption. *FRVR Corporation—Acquisition and Operation Exemption—Chicago and North Western Transportation Company*, Finance Docket No. 31205 (I.C.C. Feb. 21, 1989) ("Acquisition Decision"). At the outset, the Commission declined to impose labor protection under the discretionary "exceptional circumstances" standard of section 10901, a decision the RLEA does not contest. Acquisition Decision at 6. Turning to the RLEA's arguments, the Commission found that FRVR operated independently of its parent and affiliated carriers and that it had not been created for the sole purpose of evading section 1347's labor protection provisions; therefore, its application was properly considered under section 10901. *Id.* at 6-8. Petitioners seek review of the Acquisition Decision in No. 89-1183.

In the meantime, because FRVR would become a carrier subject to ICC regulation upon consummation of its purchase of the Duck Creek South lines, it became necessary for Itel and Itel Rail to assure themselves of the continued right to control FRVR. Accordingly, on December 24, 1987, they filed a petition pursuant to section 10505 for an exemption from the prior approval and other provisions of section 11343 and for authority to

combine control over FRVR with Itel Rail's control over its existing carrier subsidiaries. The Commission granted the exemption and imposed labor protective conditions as required by section 11347, but failed to specify explicitly whose employees would be protected by them.

Following that decision, the RLEA filed a petition for reopening for clarification or reconsideration, urging that the protective conditions be applied to the CNW employees on the Duck Creek South lines. The RLEA argued that Itel Rail's continued control of FRVR was inextricably linked to FRVR's acquisition of CNW's line, as there would be no need for the control authorization without the acquisition, and thus that labor protection must apply to the Duck Creek South employees because they are "employees who are affected by the transaction" at issue in the common control arrangement. Itel, FRVR, and CNW opposed the petition.

In a decision issued on September 12, 1988, the ICC declared that it would not impose labor protection for the benefit of CNW's employees. *Itel Rail Corporation and Itel Corporation—Continuance in Control Exemption—FRVR Corporation*, Finance Docket No. 31206 (I.C.C. Sept. 6, 1988) ("Control Decision"). The Commission explained that CNW was not a party to the control transaction that was the subject of the exemption, that CNW's employees were not directly affected by it, and that the only employees entitled to labor protection under section 11347 were those of the Itel system. Control Decision at 3. The Commission thus "rejected the argument that employee protection should be extended to employees of nonapplicant carriers." *Id.* In effect, then, the Commission viewed the acquisition of Duck Creek South and the continued control of FRVR as two entirely separate transactions governed by different statutory provisions; the ICC reasoned that only the acquisition transaction "even possibly could have a direct and allegedly adverse effect on CNW employees." *Id.* The RLEA petitions for review of the Control Decision in No. 88-1793.

We address the two petitions together to consider the RLEA's contention that the Control and Acquisition Decisions present interrelated transactions and legal issues. As we find, however, that the ICC properly viewed the transactions as separate, we discuss the two decisions in turn.

II. Discussion

This case turns on the permissibility of the ICC's statutory interpretations. Where, as here, the statute is silent or ambiguous with respect to a specific issue, a reviewing court must defer to the agency's interpretation so long as it is reasonable, even if the court might have taken a different view. *Continental Air Lines v. Department of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988); *see Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 & n.11 (1984). The Commission's decisions themselves, applying the law to the facts of a particular case, will be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2) (1988); *see also Central States Enters. v. ICC*, 780 F.2d 664, 673-74 (7th Cir. 1985).

A. Control Decision

In challenging the Control Decision, petitioners argue that within the meaning of section 11347, CNW was "involved" in Itel's continued control of FRVR and CNW's employees were "affected by" the control transaction such that they were entitled to labor protection. In petitioners' view, the control and acquisition proceedings were two necessary and mutually dependent steps in a single transaction; for example, FRVR's acquisition of CNW's line was dependent upon Itel Rail's continued control of FRVR because Itel Rail's equity contribution and loan guarantee had financed the purchase. The underlying allegation, of course, is that Itel created FRVR so that Duck Creek South could be acquired by a non-carrier,

thus qualifying the acquisition for section 10901 treatment, preventing CNW from being a party to the control proceeding, and thereby avoiding mandatory labor protection under section 11343. Therefore, petitioners assert, the Commission should have looked to the true nature and practical effects of the transaction, from which perspective CNW was certainly "involved" in, and its employees "affected by," the control transaction.

Whatever Itel's supposed ulterior motives may have been, the Commission's view that section 11347 does not require labor protection for employees of nonapplicant carriers like CNW is firmly supported by previous decisions in this and other circuits. *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983); *Southern Pacific Transp. Co. v. ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984) (adopting holding and reasoning of *Lamoille Valley*), *cert. denied*, 469 U.S. 1208 (1985); *see also Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 410-12 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981); *Crounse Corp. v. ICC*, 781 F.2d 1176, 1192-93 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986).

In *Lamoille Valley*, we reviewed the Commission's approval of a merger of the Maine Central Railroad with the Boston & Maine Railroad pursuant to section 11343. The Commission imposed labor protection for employees of the merging carriers but not for those of competing railroads who might lose their jobs as a result of the merger. We affirmed the ICC's interpretation of section 11347 "as requiring it to protect only employees of the merging railroads and not employees of other railroads." 711 F.2d at 323.

Petitioners nonetheless argue that *Lamoille Valley* and the other cases we have cited are distinguishable in that they relate only to whether labor protection in the case of a merger should be extended to employees of competitors, and not to the particular facts before us. Those

cases cannot be so narrowly limited. Although it is true that protection was sought for employees of competitors, the decisions are not predicated on that fact. In *Lamoille Valley*, for example, we looked first to the language of the statute and reasoned as follows:

> The second sentence of § 11,347 provides that "the arrangement may be made by *the rail carrier* and the authorized representative of *its* employees." (Emphasis added.) The phrase "the rail carrier" presumably refers back to the preceding sentence and thus includes only "a rail carrier . . . involved in the transaction." But an arrangement between "a rail carrier involved in the transaction" and "its employees" will not protect employees of other carriers. Thus, Congress must not have contemplated protecting employees of nonapplicant railroads.

Id. In addition, we explained that the Commission's interpretation was supported by the legislative history, by "considerations of practicality and administrative economy," by the consistency of the Commission's view of section 11347 since its original enactment in 1940, and by the precedent of other courts. *Id.* at 323-24. None of this reasoning distinguishes employees of competitors from those of non-applicants generally; all of it supports the Commission's contention that CNW's employees are not entitled to the protections of section 11347 for the compelling reason that CNW was not a party to the control proceeding.

Finally, even if the prior cases did not definitively address whether under section 11347 a non-applicant carrier could ever be sufficiently "involved" in a transaction for which approval is sought to trigger labor protection for "affected" employees, we conclude that the ICC's interpretation of "involved" to mean only those who formally participate as parties to a transaction is reasonable. *See Chevron*, 467 U.S. at 843 & n.11. We do not decide whether a control transaction might be structured

in such a way as to include as parties to "the transaction" entities that are neither the controlled nor the controlling party, and would thus not be applicants before the Commission. Petitioners have not challenged the Commission's finding that CNW was not "a party to the control transaction" and consequently the issue is not before us. Accordingly, we affirm the Control Decision.

B. Acquisition Decision

The RLEA also seeks review of the Acquisition Decision, in which the Commission concluded that FRVR's purchase of Duck Creek South was an acquisition by a non-carrier, thus subject to section 10901. The RLEA argues, again, that the formalities of corporate structure —here, the use of a newly created subsidiary to make the purchase—should not be allowed to obscure the true nature and practical effects of the transactions. According to the RLEA, the acquisition of Duck Creek South should have been treated as a section 11343 transaction because of the relationship among the various Itel entities and because FRVR was created largely for the purpose of evading the labor protection provisions of section 11347.

In addressing petitioners' charge that FRVR was effectively the "alter ego" of Itel, the Commission asserted that to sustain their argument, they must

> show[] [either] that FRVR was created exclusively for the purpose of evading the labor protection requirements of section 11347 or that FRVR is not a separate entity because it is not sufficiently independent of its parent or affiliated carriers.

Acquisition Decision at 6. The Commission found that petitioners had failed the first test because the record confirmed that FRVR had been formed for legitimate and substantial business reasons that were unrelated to the labor issue. It also found that there were sufficient indicia of the subsidiary's financial and operational independence

to justify classifying it as a non-carrier, citing *Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987) ("*RLEA v. ICC*"), and *Railway Labor Executives' Ass'n v. United States*, 791 F.2d 994 (2d Cir. 1986) ("*RLEA v. U.S.*"), as authority for this conclusion.

These cases amply support the Commission's analysis of the independence factor. In *RLEA v. ICC*, we reviewed a Commission grant of an exemption from prior approval for a non-carrier's acquisition of a rail line. The acquirer, the Rochester and Southern Railroad, was a wholly owned subsidiary of Genesee and Wyoming Industries, Inc., which also owned two rail carriers that would have benefited from the acquisition. As in this case, the corporations had some common officers and directors, and the acquisition by Rochester and Southern was financed in part by an equity contribution from its parent. Nevertheless, Rochester and Southern would own and operate the line itself, publish its own tariffs, directly serve the acquired line's patrons, assume responsibility for its own financial and contractual obligations, purchase its own equipment, and hire its own employees. *See* 819 F.2d at 1172-73; *Rochester and Southern R.R. and Genesee and Wyoming Industries, Inc.—Exemption from 49 U.S.C. 10901, 11301, and 11343*, Finance Docket No. 30779 (I.C.C. June 27, 1986), at 2, 5. In affirming the Commission's determination that Rochester and Southern was an independent corporate entity, we explained:

> Where, as here, a subsidiary is financially independent of its parent corporation *and* is not financially guaranteed by the parent . . . the ICC is not *compelled* to ignore corporation formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence.

819 F.2d at 1173 (emphasis in original). We then concluded that the ICC's analysis of Rochester and South-

ern's independence was reasonable and supported by the facts. *Id.*

The Second Circuit reached the same conclusion on similar facts in *RLEA v. U.S.*, 791 F.2d at 1006, which we cited with approval in our *RLEA v. ICC* decision. *See RLEA v. ICC*, 819 F.2d at 1173. There, the parent company guaranteed its subsidiary's financial obligations to the selling carrier in connection with the purchase of approximately thirty-one miles of track and trackage rights. The guarantee did not, however, extend to any obligations that the subsidiary might incur in the operation of the newly acquired line. Looking to the "indicia" of independence" of the subsidiary, the court affirmed the Commission's conclusion that the subsidiary was independent and thus a non-carrier, explaining that with the exception of the initial purchase guarantee, the subsidiary "ha[d] assumed all of the risks of the venture on its own and is not to be financially guaranteed by its parent." 791 F.2d at 1006.

In the instant case, the Commission followed precisely the reasoning of *RLEA v. ICC* and *RLEA v. U.S.*, and treated Itel and FRVR as separate entities based on its assessment of FRVR's independence. *See* Acquisition Decision at 7-8. In its factual analysis, moreover, the Commission adhered to clear precedent: Like Rochester and Southern in *RLEA v. ICC*, FRVR would own and operate the acquired line under its own name, publish its own tariffs, have its own employees, management, and equipment, and assume sole responsibility for its own operating liabilities. *Id.* at 4, 7-8. Thus, on examining the indicia of FRVR's independence, the Commission reasonably concluded that FRVR was financially and operationally independent of its parent and a non-carrier. *See* Acquisition Decision at 8.

Petitioners, however, argue that Itel's guarantee of a portion of the acquisition debt—a condition admittedly not present in *RLEA v. ICC*—demonstrates that FRVR

is not sufficiently independent of its parent. We agree with the ICC that this guarantee alone need not negate FRVR's financial independence. Although, in *RLEA v. ICC*, we did not specifically adopt the distinction made in *RLEA v. U.S.* between a financial guarantee undertaken by the parent in connection with the initial acquisition financing of its subsidiary and a financial guarantee of the subsidiary's operations, *see* 791 F.2d at 1006, that distinction is reasonable and properly applied in this case. A newly organized subsidiary will be endowed either with assets with which to commence business or with the financial means to acquire them. It makes little difference whether the initial financing takes the form of cash or a debt guarantee to cover the purchase of capital assets. We thus find it perfectly reasonable for the Commission to conclude that FRVR is financially independent of its parent because "Itel [has] assum[ed] none of the risks in the operation of the line." Acquisition Decision at 8.

Petitioners nevertheless challenge the Commission's test of independence by referring us to several recent ICC decisions which, they say, undermine the Commission's reasoning in the instant case by using a different standard for determining whether a subsidiary is a non-carrier. *See, e.g., Delaware and Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, Finance Docket No. 30965 (I.C.C. Oct. 23, 1989); *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line R.R. Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505 (I.C.C. Nov. 13, 1989). Whatever the merits of those decisions, they have no bearing on our disposition of the petition for review of the Acquisition Decision because that decision was delivered before the ones cited by petitioners. It is our task to determine whether that case was properly decided on the basis of the policies and precedents relied on by the agency at the time of its decision. *See, e.g., Reservation Tele. Co-op. v. FCC*, 826 F.2d 1129, 1134 (D.C. Cir. 1987);

Population Institute v. McPherson, 797 F.2d 1062, 1092 (D.C. Cir. 1986).

The other factor relied on by the ICC in determining FRVR's status was whether "FRVR was created *exclusively* for the purpose of evading the labor protection requirements of section 11347." Acquisition Decision at 6 (emphasis added). Petitioners urge that the formalities of corporate structure should have been disregarded because a substantial purpose of FRVR's creation was to evade the imposition of labor protection.

As evidence of such a purpose, petitioners point to certain provisions of the purchase agreement between FRVR and CNW that stipulate, first, that consummation of the transaction is conditioned on its exemption from ICC regulation under section 10901; second, that FRVR warrants that it will qualify as a non-carrier within the meaning of section 10901, "it being understood that one of the factors inducing [CNW] to enter into this Agreement is the foregoing representation"; and third, that the closing of the transaction is subject to the condition that "no administrative or judicial order or decision shall contain or impose on [FRVR] any conditions or provisions for labor . . . protection . . . ." Petitioners maintain that these provisions indicate that the transaction was deliberately structured to avoid employee protection.

In its decision, the ICC responded to this argument by observing, first, that "the existence of the Agreement's labor provisions is not, by itself, dispositive of the issue of whether FRVR was created exclusively to evade labor protection." Acquisition Decision at 6. It then referred to a similar purchase agreement in another case in which the Commission had concluded that such provisions served the legitimate business purposes of "preserv[ing] contractual freedom should the economics of an agreement be altered by regulatory action" and "establish[ing] the compensation the seller is willing to receive and the amount

the buyer is willing to pay." *Id.* at 7. The Commission found that in the instant case the labor provisions served legitimate objectives and that the RLEA had "submitted nothing of record" to show that the avoidance of labor liabilities was "the exclusive reason for the creation of FRVR." *Id.*

At the same time, the Commission declared that "the evidence suggests that FRVR was created for a number of reasons." *Id.* For instance, the Commission noted that Itel Rail and CNW believed that as a local short-line carrier, FRVR would be able to forestall the traffic erosion that CNW had been experiencing on the Duck Creek South lines and otherwise to compete successfully with motor and other carriers in the area. This conformed with the Commission's own experience, which indicated that small regional carriers were able to operate marginal lines more effectively than larger carriers because of their local orientation and dependence on local traffic for survival. *Id.* The ICC also observed that FRVR's creation resulted from the desire to insulate Itel and Itel Rail from the risks assumed by their subsidiary's new venture beyond the amount advanced as initial capital in the form of cash and a loan guarantee. *Id.*

There is evidence in the record to support the ICC's conclusion that these were in fact valid reasons for FRVR's creation. In the notice filed by FRVR and CNW for an exemption from section 10901, the two companies represented that

> FRVR was formed as a separate subsidiary . . . because this structure . . . will minimize the risks to Itel Rail of this new regional rail operation. In addition, this structure will make it possible to consummate the transaction and commence operations more quickly than any other available alternative. Itel Rail and FRVR have determined that timely commencement of service is absolutely essential to FRVR's abil-

> ity to compete with other rail and motor carriers in the area. In particular, FRVR will face substantial competition from Wisconsin Central Ltd., which has been actively soliciting commitments from shippers. This structure offers FRVR the greatest prospect of being able to commence operations quickly, a vital element of its strategy to be an able and effective competitor in the region.

Notice of Exemption filed Sept. 28, 1988, at 4-5. These assertions are supported by a verified statement of Stephen P. Selby, President of FRVR, who confirmed the above and stated that "[w]e recognize that the major factor which makes regional railroad operations a success is their ability to be customer responsive quickly and at top levels." Verified Statement of Stephen P. Selby dated Dec. 22, 1987, at 2, 8. *See also* Verified Statement of L. F. Fox, Assistant Vice President of CNW, at 5 ("Our objective now is to identify lines which, while characterized by conditions that preclude successful operations by [CNW] . . ., nevertheless can be operated profitably and efficiently by a new regional carrier.").

Based on the above, we are satisfied that the Commission reasonably concluded that FRVR was organized for substantial business reasons unrelated to the employee protection liabilities that would have been incurred had the purchase been made by an operating rail subsidiary. We are reluctant, however, to endorse the Commission's formulation that in order to be considered an alter ego of its parent, a subsidiary must have been created for the exclusive purpose of evading the employee protection provisions of section 11343. We prefer to defer that determination until such time as we are presented with a case where the justifications for the formation of a non-carrier subsidiary are less substantial, and the reasonableness of the Commission's rule can be put to a more demanding test.

In the instant case, therefore, we simply conclude that as FRVR met the test of independence and was formed for reasons that are both legitimate and substantial, the ICC could reasonably determine that it was a non-carrier for purposes of section 10901.

III. Conclusion

We conclude that the Commission's interpretations of sections 10901 and 11343 are reasonable and consistent with our precedent, and that its application of the law to the facts of these cases supports its findings that CNW was not involved in the control transaction and that FRVR is an independent entity formed for legitimate business purposes, and therefore a non-carrier. Accordingly, the Commission properly declined to impose labor protective conditions for the benefit of CNW's employees. The petitions for review are

Denied.

Nov. 20, 1990

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001-2866

CONSTANCE L. DUPRE
Clerk

GENERAL INFORMATION
(202) 535-3300

November 16, 1990

General Counsel
Interstate Commerce Commission
12th and Constitution Avenue, NW
Washington, DC 20423

Re: 89-1183

Railway Labor Executives' Assoc. v. ICC & USA

Dear Sir/Madam:

Pursuant to the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure transmitted herewith, in lieu of a formal mandate, is a copy of this Court's opinion and a certified copy of the judgment, both filed on September 14, 1990.

Kindly acknowledge receipt on the enclosed extra copy of this letter.

For the Court:

CONSTANCE L. DUPRE
Clerk

By: /s/ Elizabeth Brown
Deputy Clerk

Enclosure
cc: All counsel (letter and judgment) Counsel need not acknowledge receipt.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32106

ITEL RAIL CORPORATION and ITEL CORPORATION—
CONTINUANCE IN CONTROL EXEMPTION—
FRVR CORPORATION

Decided: September 6, 1988
[Service Date Sep. 12, 1988]

In a decision served February 5, 1988, we granted Itel Rail Corporation (Itel Rail) and, in turn, Itel Corporation (Itel), an exemption under 49 U.S.C. 10505 to continue in control of FRVR Corporation (FRVR), a noncarrier, upon FRVR's acquisition: (1) of the Chicago and North Western Transportation Company's (CNW) "Duck Creek South" lines between Green Bay and Milwaukee, WI; and (2) of incidental trackage rights over CNW's lines between Granville, WI, and CNW's Butler Yard in Milwaukee.[1] We imposed the standard labor pro-

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[1] On December 23, 1987, in Finance Docket No. 31205, *FRVR Corp.—Acq. and Oper. Exempt.—Chicago and N.W. Trans. Co.*, FRVR and CNW filed a notice of exemption under 49 CFR 1150.31 to acquire these lines and incidental trackage rights. A caption summary of the notice was published in the *Federal Register* on January 11, 1988 (53 F.R. 647).

On March 4, 1988, FRVR and CNW filed a supplement to their notice of exemption stating that as part of the transaction CNW will also retain incidental, overhead trackage rights between Duck

tective conditions for control transactions. *See New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 670 (1979).

RLEA alternatively seeks clarification of these conditions or reconsideration of our decision. Michigan Wisconsin Transportation Company, Inc., (MWT) also seeks

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Creek (milepost 4.00) and Green Bay (milepost 0.00) for the exclusive purpose of interchanging traffic at CNW's North Green Bay Yard, which is being acquired by FRVR. The supplement reflected operating considerations that were previously agreed to but inadvertently overlooked when the notice of exemption was originally filed. It was served and published in the *Federal Register* on March 18, 1988 (53 F.R. 8986).

FRVR and CNW included in their notice of exemption a request that the Commission clarify its jurisdiction over labor issues arising out of the formation of this and other shortline railroads. By decision served January 29, 1988, the Commission responded affirmatively, finding that, to the extent necessary, the Railway Labor Act (45 U.S.C. 151) is preempted by the Interstate Commerce Act (ICA) to permit parties to consummate transactions previously authorized or exempted by the Commission under 49 U.S.C. 10901 of the ICA. The Railway Labor Executives' Association (RLEA) has sought judicial review of the January 29th decision. *Railway Labor Executives Ass'n* v. *ICC*, No. 88-1280 (8th Cir., filed February 9, 1988). Subsequently, RLEA petitioned for a cease and desist order to delay consummation of the acquisition transaction until 30 days after completion of judicial review. This was treated as a petition to stay consummation of the sale of the Duck Creek South lines to FRVR pending completion of judicial review, and it was denied in a decision served March 11, 1988.

Michigan-Wisconsin Transportation Company, Inc. (MWT), petitioned for stay and revocation of the notice of exemption in Finance Docket No. 31205 and the Wisconsin Department of Transportation petitioned for a procedural schedule responsive to the FRVR-CNW clarification request and certain other procedural action. The requests for stay and procedural action were denied in a decision served January 15, 1988. The decision stated that MWT's revocation request would be considered in a subsequent decision in Finance Docket No. 31205. Thereafter, RLEA petitioned for revocation of the exemption and later filed a supplement. This petition will also be considered in the subsequent decision ruling on the merits of the revocation requests in Finance Docket No. 31205.

reconsideration. Itel Rail and Itel (collectively Itel) replied to both petitions. CNW seeks leave to intervene, and it replied to RLEA's petition and joined in Itel's reply to MWT's petition. CNW's request for leave to intervene is unopposed and will be granted. CNW is concerned with the possible imposition of labor protection for the benefit of any CNW employees adversely affected by the transaction. Because CNW, as the selling carrier, would be affected by the disposition of these labor requests, its intervention is appropriate and will not result in undue delay or broadening of the issues.

DISCUSSION AND CONCLUSIONS

1. *RLEA's Petition.* RLEA contends that clarification of the labor protective conditions imposed in this control transaction is necessary because the conditions do not specify which employees are covered. Asserting that the control and acquisition transactions are inextricably linked, RLEA argues that the labor protecitons mandated under 49 U.S.C. 11347 for control transactions governed by 49 U.S.C. 11343 should also apply to any CNW employee adversely affected by the related section 10901 acquisition. It states that CNW employees will be adversely affected because CNW will no longer operate over the lines to be acquired by FRVR. If this was not our intention, RLEA requests reopening and reconsideration of the February 5th decision for the purpose of extending labor protection to CNW employees.

In reply, Itel and CNW contend that RLEA's petition constitutes a collateral attack on our decision in *Class Exempt. for the Acq. and Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987). There we stated that labor protection would be imposed in section 10901 acquisition transactions only where exceptional circumstances are shown. CNW notes that exceptional circumstances have not even been alleged

by RLEA and that, even if they were, they would be relevant only to the acquisition and not the control transaction.

Itel and CNW argue that there is nothing of record to suggest that these transactions differ from others so as to merit labor protection for the benefit of CNW employees. They emphasize that the control and acquisition transactions are completely different, involving different parties and issues, and that they are governed by different statutory provisions. Because CNW is not a party applicant to, and has no interest in, the control transaction, Itel and CNW argue that the labor protection imposed there cannot extend to CNW.

RLEA cites a number of decisions to support the imposition of labor protection on the selling carrier when the acquisition and control transactions are inseparable.[2] In response, Itel and CNW contend that these decisions are not pertinent, that RLEA has misinterpreted them, and that for the most part they involve situations where the carrier that was the subject of the labor protection request was also a party to the transaction in which it was imposed.

It was not and is not our intention to impose labor protection on CNW in this control proceeding. Section 11347 requires the imposition of labor protection only for employees adversely affected by the section 11343 control transaction. The control transaction directly affects only employees of carriers in the Itel system. CNW was not a party to the control transaction and its employees are not directly affected by it. The fact that CNW was the vendor in the acquisition transaction provides no basis

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[2] *Texas & Pac. Ry. Co. Oper.*, 247 I.C.C. 285 (1941); *Gulf, Mobile & Ohio R. Co.—Aband.*, 282 I.C.C. 311 (1952); *Louisiana & Arkansas Ry. Co.—Aband.*, 290 I.C.C. 434 (1954); *Seaboard Air Line R. Co.—Trackage Rights*, 312 I.C.C. 797 (1962); and *Soo Line R. Co.* v. *United States*, 280 F. Supp. 907 (1968) (*Soo*).

for granting the relief sought here by RLEA. Nor do the issues in this control proceeding concern CNW. They differ substantially from the issues in the acquisition proceeding and are governed by different statutory provisions.

We agree with Itel and CNW that, with the possible exception of the decision in the *Soo* case, *supra*, note 2, the decisions RLEA relies on to support the imposition of labor protection on CNW in this control proceeding are distinguishable. These decisions for the most part concern the imposition of labor protection on a carrier directly involved in a transaction when that carrier's employees were affected directly and not through another transaction for which separate statutory approval was required. Here, CNW employees were unaffected and CNW was not an applicant with respect to this control transaction. Accordingly. the imposition of labor protection on CNW under these circumstances would be inappropriate at best.

We have consistently rejected the argument that employee protection should be extended to employees of nonapplicant carriers. *See Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-50 (1980); *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 L.C.C. 292, 344 (1982); and *Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984).

Even assuming the *Soo* decision lends support to RLEA's position, the reasoning employed there was specifically rejected by the United States Court of Appeals for the Sixth Circuit in *Crounse Corp.* v. *ICC*, 781 F.2d 1176, 1193 (6th Cir. 1986). The Court of Appeals found that this Commission's reasoning in *Soo* failed to give any meaning to the word "affected" in section 11347's description of those employees entitled to labor protection. The Court of Appeals also stated that ". . . every court of appeals that has considered the question has concluded that section 11347 does not apply to employees

not directly involved in the transaction." *Id.* at 1192. Indeed, the judge who wrote the *Soo* decision has since acknowledged that 11347 generally does not cover employees of other railroads which might be affected by the merger. *Cosby* v. *ICC*, 741 F.2d 1077, 1079 n.2 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985).

The issue of labor protection for CNW employees is relevant solely to the acquisition transaction. It is only this transaction—the acquisition of CNW's Duck Creek South lines by FRVR—that even possibly could have a direct and allegedly adverse effect on CNW employees. The control transaction and any adverse effect that transaction may have on employees relates only to Itel's employees.

Our distinction between the acquisition and control transactions does not deny RLEA an opportunity to justify in the acquisition proceeding the imposition of labor protective conditions on CNW employees. In Finance Docket No. 31205, RLEA argues that the acquisition exemption should be reopened and revoked to the extent necessary to impose protective conditions because FRVR is merely an alter ego of Itel created solely to evade the labor protective requirements of section 11347. That is the appropriate proceeding to make the argument advanced here. In a decision served May 27, 1988, RLEA was granted discovery to permit it to obtain the information it maintains will prove these allegations.[3]

A decision on the merits of the petitions for revocation of the acquisition exemption will be made following the receipt of all pleadings relating to the reconsideration and/or revocation. Our decision on whether to reopen and revoke the exemption in part for the purpose of imposing labor protection on CNW will be based on whether RLEA

[3] Midtec Paper Corporation, a group of shipper organizations, and MWT were also authorized discovery in connection with the acquisition exemption in a decision served March 18, 1988.

has satisfied its burden of showing exceptional circumstances, as required by *Exemption, supra.* As stated in our January 29th decision in the acquisition proceeding, we will consider as exceptional circumstances a showing that: (1) there was misuse of the Commission's rules or precedent; (2) existing contracts subjected line sales to procedural or substantive protection; or (3) the injury to labor is unique and disproportionate to the gains achieved for the local transport system and that compensation is feasible without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

Having found that the acquisition transaction is the appropriate place to consider and rule on RLEA's labor protection request and that the control transaction is inappropriate for that purpose, we must deny RLEA's alternative request to reopen and reconsider this control proceeding.

2. *MWT's petition.* Itel Rail is a subsidiary of Itel. It directly or indirectly controls several motor carriers and five Class III railroads including the Green Bay & Western Railroad Company (GBW). The GBW runs east-west. It will connect with FRVR at Green Bay, and this connection will give it access to CNW at Milwaukee. MWT operates a rail ferry across Lake Michigan between Kewaunee, WI, and Ludington, MI. Its only connection in Wisconsin is with GBW at Kewaunee. MWT contends that it relies exclusively on GBW for interchanging the traffic that is integral to its existence. If Itel Rail is permitted to exercise common control over both GBW and FRVR, MWT fears that GBW traffic will be diverted from its cross-lake routing to FRVR's Chicago gateway routing via Green Bay and Milwaukee.

MWT contends that regulation is necessary to carry out the goals of the rail transportation, specifically those goals directed at: (1) allowing competition and the de-

mand for services to establish reasonable rail rates [49 U.S.C. 10101a(1)]; (2) ensuring the development and continuation of a sound transportation system with effective competition among rail carriers and with other modes [49 U.S.C. 10101a(4)]; (3) fostering sound economic conditions in transportation between rail carriers and other modes [49 U.S.C. 10101a(5)]; and (4) prohibiting predatory pricing and practices to avoid undue concentrations of market power and unlawful discrimination [49 U.S.C. 10101a(13)]. MWT raised similar arguments in opposition to Itel's original petition to exempt from regulation Itel's continuance in control of FRVR. We disagreed with MWT's contentions, finding instead that continuation of a sound rail system would not be affected by the continuance in control. Essentially, we found that MWT had not shown that the proposed common control was likely to alter materially the transportation operations and services currently provided by the affected carriers. MWT contends that we failed to give adequate consideration to its arguments, and it asserts that we now, for the first time, have an opportunity thoroughly to consider the anticompetitive issues it raises.

MWT also challenges our findings with respect to its traffic diversion argument. We had discounted GBW's ability to control the routing of traffic moving over its line because we found that shippers ordinarily select their routings and that there was nothing to indicate that they would not have that right here. While acknowledging that shippers generally have this right, MWT argues that routing selections are heavily influenced by the originating and/or terminating carrier and by the carrier supplying the car or cars. MWT asserts that it has no influence on the routing of GBW traffic because it is a bridge carrier and does not supply cars. Aside from having no influence over traffic routings, it assertedly would be unable to compete for GBW traffic if, as a result of the common control, GBW and FRVR were

to undercut the rates applicable to MWT's cross-lake routing.

MWT asserts that the acquisition and control transactions were designed to create a north-south system extending via FRVR between Green Bay and Milwaukee to Chicago with GBW and FRVR feeding traffic to each other. Otherwise, it contends that there would have been no reason for Itel to acquire a line connecting with GBW at Green Bay. In this regard, it also observes that Itel reassigned GBW's former President and Vice President-Marketing and Sales to FRVR and contends that this was done intentionally to ensure that GBW and FRVR are run as a single system.

MWT also requests that we reconsider our refusal to impose the alternative conditions offered by it to negate the possible adverse effects of the transaction on its cross-lake ferry service.[4] We declined to impose those conditions finding that the cost burdens they would impose on GBW and FRVR would ultimately be borne by shippers in the form of higher rates. We also found the conditions generally protective in nature and that, as such, they are anticompetitive and contrary to the public interest. *Traffic Protective Conditions*, 366 I.C.C. 112 (1982). We stated that, if in the future MWT believes it is being excluded from GBW traffic as a result of unlawful action by GBW and/or FRVR, it may file a complaint for appropriate relief.

MWT requests that we reconsider these findings and impose the conditions if we affirm our decision granting the exemption. MWT states that the conditions are merely

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[4] These conditions would require: (1) a service agreement by Itel to maintain Kewaunee as a competitive gateway; (2) a car hauling agreement between Itel and MWT at a specified compensation of $1.75 per loaded mile with a $100 minimum per car; (3) an option for 10 years to allow MWT to acquire trackage rights over the lines of GWB and FRVR; and (4) an option and right of first refusal for MWT to purchase GBW's Kewaunee ferry slips.

designed to preserve its right to exist and that shippers would gain from the preservation of competitive options. It argues that the complaint process is an inadequate remedy because it would transfer the burden of proof to MWT. Moreover, it contends that it is operating at a loss and as a consequence fears that it would not be financially able to prosecute a complaint to completion.

Finally, MWT disputes our limited scope finding. It contends that GBW's traffic moves throughout the country and affects many more than the three shippers now using both the GBW and FRVR. It argues that all shippers on both sides of Lake Michigan have an interest in maintaining MWT as a competitive alternative to the Chicago routing. In this regard, it also argues that regulation is necessary to prevent a potentially serious abuse of market power through loss of its cross-lake ferry service.

In response, Itel notes that, under 49 U.S.C. 10327(g)(1) and the corresponding regulations in 49 CFR 1115.3, a proceeding may only be reopened based upon a showing of new evidence, changed circumstances, or material error. Itel states that MWT made no attempt to offer new evidence or show changed circumstances. It characterizes MWT's petition as based solely on bare allegations of material error and vague, unsupported opinions of how persons may act under assumed circumstances. Itel argues that all of MWT's arguments were previously raised and adequately considered.

Itel further states that MWT's fears of traffic diversion are unfounded. Assertedly, the acquisition was premised on FRVR's moving approximately 80,000 carloads annually. In comparison, GBW interchanged only 3,800 carloads with MWT in 1987. Accordingly, Itel maintains that FRVR's success or failure in no way depends on this small amount of GBW traffic. In Itel's view, the diversion of this traffic was not intended and was not one of the motivations leading to the acquisition.

To the contrary, Itel asserts that the diversion of GBW traffic to FRVR would be illogical because GBW's revenue divisions would be reduced while the operating costs over the longer GBW/FRVR route would be increased. To further illustrate the illogical nature of the diversion argument, Itel refers to the fact CSX Transportation, Inc. (CSX), MWT's sole eastern connection, already has the capacity to route traffic around Lake Michigan, but still uses MWT's cross-lake ferry service.

In support of our limited scope finding, Itel notes that GBW is a Class III railroad operating over 250 miles entirely within the State of Wisconsin and that FRVR would be a Class II railroad operating over 208 miles of track in the same State. Without disputing that GBW traffic may move throughout the country, Itel emphasizes the local nature of GBW's service by observing that GBW either originates or terminates more than 90 percent of the traffic moving over its line. Additionally, it contends that whatever potential there is for diverting GBW traffic from MWT does not detract from the former limited scope finding. Responding to MWT's contention that regulation is necessary to prevent an abuse of market power, Itel notes that this provision of section 10505 is designed to protect shippers, rather than carriers, and that no shipper has raised the issue of possible market abuse.

We agree with Itel that MWT's concerns are conjectural and unsupported. Essentially, they are the same arguments we considered in our February 5th decision. While MWT has elaborated on them somewhat, it offers nothing to warrant a change in the conclusions we made in that decision.

The primary basis for MWT's petition for reconsideration and its alternative request for imposition of traffic conditions is its contention that Itel's common control of GBW and FRVR will lead to the diversion of GBW traffic from MWT to FRVR. It argues that, if GBW's traffic is diverted, MWT will fail, and an alternative competitive

routing would be lost in violation of the pro-competitive thrust of the rail transportation policy and the abuse of market power criterion of section 10505.

Contrary to its contention, we had adequate time to consider this issue when we granted Itel's control exemption without conditions. In any event, as already noted, MWT has not submitted any additional support for its traffic diversion argument. (The burden of proof here is the same were MWT to file a separate complaint.) Itel, on the other hand, indicates that GBW/MWT traffic is relatively small and would constitute less than 5 percent of FRVR's projected traffic volume. Without minimizing the importance of this traffic to MWT, Itel argues persuasively that it has no reason to divert it to FRVR. On the contrary, there appears to be merit to its contention that diversion is not in GBW's or Itel's best financial interest because GBW's revenues would decline in connection with the longer movement and the addition of another non-Itel affiliated railroad to the routing. Because of the higher costs and reduced divisions associated with diversion, MWT's fears concerning non-competitive reduced rates via a GBW-FRVR routing appear to be groundless.

MWT's contention that Itel's reassignment of the two GBW officers to FRVR is proof that the two Itel subsidiaries will be run as a single system and that GBW traffic will be routed over FRVR to the maximum extent possible is entirely conjectural. It simply does not carry much weight in view of Itel's evidence indicating that it would be disadvantageous for GBW and FRVR to divert this traffic. Similarly, MWT's argument that it lacks the ability to influence shipper routing because it neither originates nor terminates traffic and provides no cars must be discounted in view of Itel's diversion evidence with respect to CSX. MWT's lack of influence over traffic routing presently exists with respect to CSX traffic and, as Itel notes, MWT has continued to participate in CSX's traffic. There is nothing in the record to suggest that diversion

would commence following the startup of operations by FRVR. Accordingly, we affirm our finding that approval of this control exemption is consistent with the rail transportation policy in that it will not materially change the transportation operations or services currently provided by the affected carriers.

Nor can we accept MWT's contention that this transaction exceeds the limited scope criteria of section 10505. Itel properly noted that more than 90 percent of this traffic originates or terminates on GBW lines. GBW is a small Class III railroad operating over only approximately 250 miles of track in a single State. FRVR hopes to qualify as a Class II carrier and will operate over only about 208 miles of track entirely within the same state. Having already concluded that no material change in transportation operations or services will result, we cannot characterize the transaction as being anything more than limited in scope.

We also reaffirm our prior finding that there is little or no potential for an abuse of market power. MWT's concerns in this regard are based on its fears of GBW traffic being diverted, thereby resulting in the loss of its cross-lake ferry service. However, as seen, there is no basis in the record for concluding that MWT will suffer a loss of GBW traffic or go out of business. Specifically, we can find no evidence to suggest that the success of these acquisition and control transactions are in any way dependent on diverting GBW traffic from MWT or that Itel would have any incentive to use routing pressure or below cost pricing to divert traffic from MWT. Shippers or other members of the public should not be adversely affected. As indicated above, numerous shippers generally support the transaction. There is no indication that any shipper or other member of the public is concerned with the potential for an abuse of market power. Not one of the three shippers who currently route over both the GBW and MWT have expressed any concern about the common

control. Moreover, we noted in our February 5th decision, that the two largest shippers support the transaction. Accordingly, we have no reason to believe that our exemption of this control transaction is likely to result in an abuse of market power.

Having found no basis for MWT's traffic diversion concerns, we must reaffirm our prior refusal to impose the alternative traffic conditions requested by MWT. As stated in our February 5th decision, we generally have found protective conditions anticompetitive and contrary to the public interest. *See Traffic Protective Conditions, supra.* While they may protect competitors, they do not protect competition. MWT has not established that these conditions are necessary or in the public interest here.

Finally, we must reject MWT's argument that the complaint process is inadequate to protect its interest. As noted, the burden of proof would be no different than it is here. We reiterate that the complaint process is available. In addition, MWT may at any time seek revocation of this exemption if on reopening it can show that its fears have materialized. All we find here is that it has not done so on this record. We will give expedited consideration to any request to reopen this proceeding based on changed facts or circumstances.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion of the Chicago and North Western Transportation Company for leave to intervene is granted.

2. The Railway Labor Executives' Association's request for clarification is granted as provided above. Its alternative request for reconsideration and the petition for reconsideration filed by Michigan-Wisconsin Transportation Company, Inc., are denied.

3. This decision is effective on the service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Lamboley commented with a separate expression.

NORETA R. MCGEE
Secretary

[SEAL]

Commissioner LAMBOLEY, commenting:

While I do not agree with the majority's presumptive and systematic refusal to impose labor protective conditions in 49 U.S.C. 10901 exemption proceedings,[1] I do agree that the proper forum to consider the imposition of labor conditions for affected CNW employees is Finance Docket No. 31205, rather than the instant control exemption proceeding. It is within the context of that acquisition proceeding RLEA will have the appropriate opportunity to make its argument.

As to the MWT petition, although no new probative evidence was submitted to merit imposition of protective conditions in favor of MWT, I reaffirm my concern about competition and potential market abuse expressed earlier in this proceeding[2] and will wait to measure the intentions and conduct of the parties in implementing this transaction.

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[1] Please see my separate expression in *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985); 49 C.F.R. 1150.31 *et seq.*; modified on reopening by decision served February 29, 1988.

[2] See my separate expression Finance Docket No. 31206, *ITEL Rail Corporation and ITEL Corporation—Continuance in Control Exemption—FRVR Corporation*, served February 5, 1988.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—ACQUISITION AND OPERATION EXEMPTION—CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Decided: February 21, 1989
[Service Date Feb. 28, 1989]

FRVR Corporation (FRVR) and the Chicago and North Western Transportation Company (CNW) filed a notice of exemption on December 23, 1987, under 49 CFR 1150.31 for FRVR, a noncarrier, to acquire and operate CNW's "Duck Creek South" lines between Green Bay and Milwaukee, WI. FRVR was also to acquire incidental trackage rights over CNW's lines between Granville, WI, and CNW's Butler Yard in Milwaukee for the purpose of interchanging traffic.[1] The exemption became effective on

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[1] In a related proceeding, Finance Docket No. 31206, *Itel Rail Corp. and Itel Corp.—Cont. in Control Exempt.—FRVR Corp.* (not printed), served February 5, 1988, we granted Itel Rail Corporation (Itel Rail) and, in turn, Itel Corporation (Itel), its corporate parent, an exemption under 49 U.S.C. 10505 to continue in control of FRVR upon FRVR's consummation of the acquisition, subject to the standard labor protective conditions for control transactions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). By decision served September 12, 1988, we clarified these conditions in response to a request by the Railway Labor

December 30, 1987, and a caption summary of it was simultaneously served and published in the *Federal Register* on January 11, 1988 (53 F.R. 647).[2]

BACKGROUND

Railway Labor Executives' Association (RLEA) petitioned for a cease and desist order to delay consummation of the acquisition until 30 days after completition of judicial review. This was treated as a petition to stay and was denied in a decision served March 11, 1988 (stay decision). Subsequently, MWT petitioned for stay and revocation of the exemption, and the Wisconsin Department of Transportation (WisDot) petitioned for a procedural schedule responsive to a FRVR-CNW clarification request (*see* note 2) and certain other procedural action.

Executives' Association (RLEA) and further, we found that labor protection should not be imposed on CNW, the selling carrier, and we denied RLEA's alternative request for reconsideration and a petition for reconsideration filed by Michigan-Wisconsin Transportation Company, Inc. (MWT).

[2] On March 4, 1988, FRVR and CNW filed a supplement to their notice of exemption indicating that as part of the transaction CNW would also retain incidental, overhead trackage rights between Duck Creek (milepost 4.00) and Green Bay (milepost 0.00) for the exclusive purpose of interchanging traffic at CNW's North Green Bay Yard. The trackage rights arrangement was previously agreed to but inadvertently overlooked when the notice of exemption was originally filed. It was served and published in the *Federal Register* on March 18, 1988 (53 F.R. 8986).

FRVR and CNW had included in their notice of exemption a request that the Commission clarify its jurisdiction over labor issues arising out of the formation of this and other shortline railroads. By decision served January 29, 1988, the Commission responded affirmatively, finding that, to the extent necessary, the Railway Labor Act (45 U.S.C. 151, *et seq.*) is preempted by the Interstate Commerce Act (ICA) to permit parties to consummate transactions previously authorized or exempted by the Commission under 49 U.S.C. 10901 of the ICA. That decision was affirmed in *Railway Labor Executives' Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988); petition for rehearing pending.

These requests were denied in a decision served January 15, 1988. Instead, we stated that MWT's revocation request would be considered in a subsequent decision. Thereafter, RLEA petitioned for revocation of the exemption and later filed a supplemental petition in support of revocation. We stated in our March 11, 1988, stay decision that RLEA's petition would also be considered in the subsequent decision ruling on the merits of MWT's revocation request.

By decision served March 18, 1988, discovery was authorized and, subject to the terms of a protective order, access to the sales agreements underlying the acquisition transaction was given to: Midtec Paper Corporation (Midtec), an affected shipper; Wisconsin-Upper Michigan Rail Users Committee; Wisconsin Paper & Pulp Manufacturers' Association, Inc.; and Wisconsin Association of Manufacturers & Commerce, Inc. (collectively Wisconsin shippers); and MWT. Subsequently, WisDot was given access to the underlying sales agreements subject to compliance with the protective order. Then, by decision served May 27, 1988, RLEA was granted discovery and also permitted access to the underlying sales agreements, subject to compliance with the protective order.[3]

Following completition of discovery, WisDot submitted a letter stating its unequivocal support for the transaction. RLEA filed both a second supplemental statement in support of its revocation request,[4] and a motion to modify the protective order to permit consideration of certain labor-related provisions of the underlying sales agree-

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[3] Although the protective order was expanded to apply to both Finance Docket Nos. 31205 and 31206, in conformity with RLEA's concerns, RLEA's supplemental statement in response to discovery, discussed *infra*, was filed only in Finance Docket No. 31205.

[4] RLEA moved for leave to file this supplemental statement. Leave to file was unnecessary under our discovery procedures. 49 CFR Subpart B-*Discovery*.

ments. Midtec, Wisconsin shippers, and MWT did not engage in discovery.

FRVR and CNW replied separately to MWT's revocation request, and FRVR filed separate replies to RLEA's revocation request[5] and to its first supplemental statement in support of that request. FRVR and CNW filed joint replies to RLEA's second supplemental statement and its motion for modification of the protective order.

DISCUSSION AND CONCLUSIONS

MWT's petition for revocation. MWT operates a rail ferry across Lake Michigan between Kewaunee, WI, and Ludington, MI. Itel Rail directly or indirectly controls several motor carriers and a number of Class III railroads including FRVR and Green Bay & Western Railroad Company (GBW). The GBW runs east-west crossing the entire State of Wisconsin. Through its connection with FRVR at Green Bay, it will have access to CNW at Milwaukee. MWT's only connection in Wisconsin is with GBW at Kewanuee.

Noting that it relies exclusively on GBW for interchanging the cross-lake traffic that is integral to its existence, MWT contends that Itel Rail, as the corporate parent of both FRVR and GBW, will have an incentive to divert GBW traffic from MWT's cross-lake routing to FRVR's Chicago gateway routing via Green Bay and Milwaukee. MWT asserts that, if this occurs, or even if the acquisition results in a less friendly connection between it and GBW, the ferry operation will lose its viability. To preserve its competitive position, MWT requests that the exemption be revoked.

Alternatively MWT requests imposition of certain conditions intended to preserve its competitive status. Spe-

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[5] CNW subscribes to the statements made by FRVR in its reply to RLEA's revocation request.

cifically, MWT requests conditions requiring: (1) GBW to provide car service 5 days a week, with train service not to exceed 18 hours; (2) GBW to enter into a car haulage agreement at a specific compensation per loaded mile and a minimum of $100 per car; (3) GBW and FRVR to grant MWT an option to acquire trackage rights over their lines; and (4) GBW to grant MWT an option, and right of first refusal, to purchase GBW's Kewaunee ferry slips and adjacent rail property. FRVR's and CNW's replies are directed to whether these conditions should be imposed.

MWT raised these same matters in opposition to the exemption petition filed in Finance Docket No. 31206 (the control proceedings), and again in its petition for reconsideration of the decision granting that petition. We considered these matters in that proceeding and, as indicated in note 1, we rejected MWT's arguments on both occasions for the reasons stated in our February 5, 1988, and September 12, 1988, decisions. Specifically, in our February 5th decision, we found unconvincing MWT's stated fears of traffic diversion. We further found that its alternative request for conditions was not shown to be warranted because: (1) the additional burdens such conditions would impose on GBW and FRVR would ultimately be borne by the shipping public; and (2) the conditions are protective in nature and we have found that protective conditions generally are anticompetitive and contrary to the public interest. *See Traffic Protective Conditions*, 366 I.C.C. 112 (1982). We also concluded that, if in the future MWT believes that it is being forced out of participation in GBW traffic as a result of unlawful action by GBW and/or FRVR, it may file a complaint seeking appropriate relief.

In our September 12, 1988, decision we noted that, while MWT had elaborated on its arguments, it offered nothing to warrant a change in our February 5, 1988, decision. We discussed in greater detail the issues raised

by MWT, and affirmed the findings in our February 5, 1988, decision relative to MWT.

MWT has offered nothing new or additional in this proceeding to support its position. Accordingly, with nothing further to consider, we will affirm our findings in the control proceeding relative to MWT and deny MWT's revocation petition here.

RLEA's petition for revocation. Acknowledging that labor protection is discretionary under 49 U.S.C. 10901, RLEA contends that this exemption from section 10901 was inappropriate because FRVR cannot be considered a noncarrier since it has not been shown to be independent of Itel Rail and/or Itel Rail's subsidiaries, particularly GBW. RLEA argues that FRVR is merely an alter ego of Itel Rail. Assertedly, it was created solely to evade the labor protection requirements of 49 U.S.C. 11347. On this basis, RLEA requests that this proceeding be reopened and the acquisition exemption revoked to the extent necessary to impose labor protective conditions for the benefit of CNW and other adversely affected employees. RLEA observes that section 11347 would have been applicable had Itel Rail used GBW, one of its rail carrier subsidiaries, to acquire the lines and that this further supports its evasion argument.

In its first supplemental statement in support of revocation, RLEA submits that FRVR's lack of independence is demonstrated by the fact that FRVR will have no assets of its own and that Itel Rail, in providing an "equity contribution" of $14 million towards the purchase, and by guaranteeing the loan for the $47 million remainder, also to be secured by the property acquired, will guarantee payment of the purchase price of $61 million.

Even if FRVR is found not financially dependent on Itel Rail, RLEA argues that there are sufficient other indicia of a lack of independence to support an alter ego finding. Although FRVR may have its own management,

enter into its own rate contracts and publish its own tariffs, hire its own employees, and conduct its own operations, RLEA asserts that these factors are insignificant when compared with the financial relationship between FRVR and Itel Rail. Alternatively, if FRVR is found to be independent and not to have been formed exclusively to evade the labor protection requirements of section 11347, RLEA contends that these other indicia of independence should be disregarded. It advocates a new test requiring that an acquiring entity, controlled by or related to a carrier, be treated as a carrier if it connects with a related carrier.

In reply, FRVR contends that RLEA has failed to demonstrate that it was created exclusively to evade its labor protection requirements of section 11347 or that it is not sufficiently independent from affiliated carriers. It argues that disregarding FRVR's separate corporate status would ignore the purposes for which FRVR was created: namely, to assure FRVR's financial independence and to minimize the financial risk to Itel Rail of the proposed new regional operation. While acknowledging that Itel Rail will guarantee the purchase loan, FRVR stresses that Itel Rail is not a guarantor of its operations and in fact will be insulated from any financial obligations incurred by FRVR in connection with its operations.

RLEA submits that portions of the Assets Purchase Agreement (Agreement) obtained through discovery demstrate that the transaction was purposely structured to avoid employee protection. Contending that these portions of the Agreement do not require confidentiality, it requests modification of the protective order to permit disclosure and consideration. In reply, FRVR and CNW question the relevancy of these portions of the agreement and argue that the continued confidentiality of the document will not impair our ability to resolve the issues raised by RLEA. FRVR and ITEL Rail contend that the terms of the Agreement relate to confidential aspects of FRVR's costs

and its corporate strategy, and that RLEA has failed to assert, much less prove, that the presentation of its case will be prejudiced by maintaining the Agreement's confidentiality.

RLEA's motion for modification of the protective order will be granted. The portions of the Agreement in question concern labor-related conditions. FRVR and CNW do not specifically assert that they are in any way confidential. Instead they maintain that their disclosure is unnecessary for the proper disposition of this proceeding. We disagree. Because the conditions concern labor and bear directly on the issues raised by RLEA, they are clearly relevant and should be considered. The conditions are incidental terms of the Agreement; they do not contain any proprietary information. Because we will consider and disclose only these labor-related conditions, FRVR's and CNW's concern about disclosure of FRVR's costs and corporate strategy is misplaced.

In its second supplemental statement, RLEA points out that the Agreement's labor-related conditions make consummation of the acquisition contingent upon the following factors: (1) that there be no significant union organization compaign or labor dispute; (2) that FRVR qualify as a noncarrier under section 10901, it being understood that its ability to do so is one of the factors inducing CNW to enter into the Agreement; and (3) that no labor protective conditions be imposed on FRVR. RLEA argues that these provisions undercut FRVR's position because they allegedly prove that FRVR was created substantially, if not entirely, to evade the imposition of labor protection, and not to isolate Itel Rail and Itel from the operational risks of the transaction or to assure FRVR's independence.

Even if the transaction is found subject to section 10901, and not section 11343, RLEA submits that the exemption should be revoked because the Agreement's labor conditions demonstrate that the transaction is contrary to the Railway Labor Act (RLA), 45 U.S.C. 151, *et seq.*

Specifically, it contends that the conditions unlawfully restrict collective bargaining rights by making the agreement voidable if: (1) there is any labor dispute; (2) there is an event that would threaten or result in increased labor costs; or (3) there is a significant union organization campaign in progress. RLEA argues that this last provision also contravenes the RLA by limiting freedom of association among employees to organize.[6]

In reply, FRVR and CNW state that the issue of FRVR's independence was previously resolved in our March 11, 1988, stay decision. They assert that RLEA's second supplemental statement merely reiterates prior arguments and that the labor-related provisions of the Agreement now being relied upon by RLEA to bolster those arguments provide no additional support for granting the relief sought. FRVR and CNW contend that these provisions simply show that they negotiated the transaction with the legitimate expectation that no labor protective conditions would be imposed and that no labor dispute would ensue. FRVR and CNW assert that there was nothing sinister in structuring the transaction to qualify under the class exemption procedures in section 1150.31. Noting that these exemption procedures were adopted expressly to permit the expeditious acquisition of marginal rail lines by noncarriers, in the expectation that these marginal lines could be revitalized, FRVR and CNW state that the structure of the transaction was entirely consistent with this objective. Notwithstanding that the transaction may have been structured to avoid the imposi-

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[6] In addition to the above labor-related provisions, RLEA objects to a provision in the Agreement requiring CNW employees seeking employment with FRVR to complete and sign a form stating that they will resign from CNW. RLEA argues that this provision unlawfully requires them to relinquish their entitlement to certain collectively bargained rights. In their reply, FRVR and CNW state that FRVR agreed, at RLEA's request, to drop this requirement. Accordingly we need not consider this allegation further here.

tion of labor protective conditions, they contend that FRVR was not created exclusively for this purpose and that RLEA has not demonstrated otherwise.

In response to RLEA's RLA arguments, FRVR and CNW observe that violations of the RLA would require total revocation, not just revocation to the extent necessary to impose labor protection. They state that the labor-related provisions of the Agreement only give FRVR the right to extricate itself from the Agreement if labor-related problems exist, and that this does not contravene any provision of the RLA. FRVR and CNW assert that RLEA's position is substantially undercut by the decision in *Chicago and Northwestern Transportation Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir. 1988), *cert. denied*, —— U.S. ——, Nov. 28, 1988 (No. 88-464) (*CNW*). There the Seventh Circuit determined that this controversy was a "minor" dispute under the RLA and as a consequence subject to arbitration, rather than the collective bargaining procedures of the RLA. FRVR and CNW also note that in our January 29, 1988, decision we determined that the RLA, to the extent here pertinent, was superceded by the Interstate Commerce Act in cases arising out of the sale or other disposition of rail properties pursuant to 49 U.S.C. 10901. This determination was affirmed by the Eighth Circuit in *RLEA* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988).[7]

At the outset, we note that RLEA has made no attempt to show the exceptional circumstances necessary to justify the imposition of labor protective conditions on the CNW, the selling carrier. *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm'n* v. *ICC*, 817

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[7] *Accord, Burlington Northern R.R.* v. *UTU*, 848 F.2d 856 (8th Cir. 1988). *But see Pittsburgh & Lake Erie R.R. Co.* v. *RLEA*, 845 F.2d 430 (3rd Cir. 1988); *Pet. for cert. granted*, No. 87-1888, 57 U.S.L.W. —— (November 28, 1988).

F.2d 145 (D.C. Cir. 1987) (*Class Exempt.*).[8] Its arguments for revocation rest on two allegations: that FRVR is merely an alter ego of Itel Rail; and that the terms of the purchase agreement contravene the RLA.

Respecting the first allegation, the parties agree that a credible alter ego argument must include either a showing that FRVR was created exclusively for the purpose of evading the labor protection requirements of section 11347 or that FRVR is not a separate entity because it is not sufficiently independent of its parent or affiliated carriers. *See* Finance Docket No. 30779, *Rochester & S. R., Inc., and Genessee & Wyo. Industries, Inc.—Exempt. from 49 U.S.C. 10901, 11301, and 11343* (not printed), served July 18, 1986 (*Rochester*), *aff'd sub nom. Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172 (D.C. Cir. 1987) (*RLEA II*); and Finance Docket No. 30629, *Staten Island Ry. Corp.—Exempt. from 49 U.S.C. 10901; Delaware Otsego Corp. & Staten Island Ry. Corp.—Exempt from 49 U.S.C. 11301* (not printed), served July 18, 1985 (*Staten Island*). Based on the evidence of record, we conclude that FRVR has not been shown to be merely an alter ego of Itel Rail.

Contrary to RLEA's contentions, the existence of the Agreement's labor provisions is not, by itself, dispositive of the issue of whether FRVR was created exclusively to evade labor protection. A similar issue arose in *Eureka*, *supra* note 8, where the purchase agreement specifically provided either party with the right to terminate the

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[8] Recent cases where we considered and ruled on issues of exceptional circumstances include: Finance Docket No. 30555, *Northwestern Pac. Acq. Corp. & Eureka So. R. Co.—Exempt. from 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988 (*Eureka*); Finance Docket No. 31089, *Montana Rail Link, Inc.—Exempt. Acq. and Oper—Certain Lines of Burlington N. R. Co.* (not printed), served May 26, 1988; and Finance Docket No. 30457, *San Diego & Imperial Valley R. Co. Inc.—Exempt. From 49 U.S.C. 10901 and 11301* (not printed), served July 27, 1988. *See also* our decision served January 29, 1988, in this proceeding, *supra* at n.2.

transaction if labor protection were imposed in the sale and granted the selling carrier a right of indemnification against the buyer for any financial obligation connected with the imposition of labor conditions. We concluded that, standing by themselves, termination/indemnification provisions constitute a legitimate effort to preserve contractual freedom should the economics of an agreement be altered by regulatory action. We found these negotiated sales terms to serve a legitimate and necessary business purpose by defining in precise economic terms the labor-related liabilities of the parties to a section 10901 transaction. They are an effort to establish the compensation the seller is willing to receive and the amount the buyer is willing to pay. In an arms length transaction we found it reasonable for a potential purchaser to reserve this option in the event that expanded, labor startup costs threaten the viability of the new enterprise. *Id.* slip op. at 7.

RLEA has submitted nothing of record to suggest that the use of these labor provisions in the Agreement at issue here represents anything more than an effort to expand the parties' options with respect to this sale. This is a legitimate business purpose, and by no means has it been shown to be the exclusive reason for the creation of FRVR. To the contrary, the evidence suggests that FRVR was created for a number of reasons. Uppermost among these was to forestall further traffic erosion and abandonments. Clearly, Itel Rail and CNW view FRVR as capable of preserving rail service and otherwise competing successfully with motor carriers in the area. Moreover, our experience demonstrates that smaller, regional shortline carriers like FRVR generally can operate marginal rail lines more effectively than Class I carriers because they are locally oriented and dependent on local traffic for their survival. *See Class Exempt., supra* at 813.

Another primary reason for FRVR's creation was to limit the risks to be assumed by Itel and Itel Rail in con-

nection with the new venture. Itel and Itel Rail were willing to advance the initial capital and otherwise guarantee the remaining acquisition costs; apparently they were not willing to assume the additional risks associated with FRVR's operation. There is nothing of record to suggest that Itel or Itel Rail acted improperly in capping the financial risks they were willing or capable of sustaining.

RLEA also contends that FRVR is not independent of Itel or of any of the carrier's subsidiaries because FRVR lacks the requisite financial independence from the carrier. In RLEA's view FRVR has no assets. FRVR's assets belong to Itel Rail due to the carrier's equity contribution of $14 million dollars and a guarantee of the loan of $47 million dollars to FRVR for the purchase of the Duck Creek South line. Thus, in RLEA's view, Itel stands as a guarantor of FRVR. RLEA also asserts that this financial relationship between parent and subsidiary outweighs any other indicia of independence and supports a finding that FRVR is nothing more than an alter ego of Itel.

RLEA is wrong. Neither the equity contribution or the loan guarantee establishes FRVR as an alter ego of Itel. The case law is clear that where the subsidiary "is financially independent of the parent and is not financially guaranteed by the parent . . . the ICC is not compelled to ignore corporate formalities but may decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence." *Railway Labor Executives' Association* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987).

In determining whether a subsidiary is financially independent of its parent, the D.C. Circuit agreed with the formulation posited by the Second Circuit in *Railway Labor Executives' Association* v. *United States*, 791 F.2d 994 (2d Cir. 1986). There the court held as independent a subsidiary whose parent guaranteed only the financial

obligations of the subsidiary to the selling carrier. In all other respects the court found the subsidiary as assuming the risks of operating the rail line as the parent had intended when it established the subsidiary. *Id.* at 1006.

The situation before us now is identical to that in the Second Circuit. Itel has guaranteed FRVR's obligations to the selling carrier, *i.e.*, the purchase price of the line. In all other respects FRVR is financially independent of its parent with Itel assuming none of the risks in the operation of the line. This independence compels the conclusion that FRVR is not an alter ego of Itel. *RLEA* v. *ICC, supra.*

Moreover, FRVR has other indicia of independence. FRVR will have its own employees, management and equipment. It will publish its own tariffs and operate under its own name. In our March 11, 1988 decision we found that these indicia fully supported our determination to classify FRVR as an independent entity and as a noncarrier. RLEA has presented no evidence warranting a contrary decision here.

RLEA requests that we adopt a new test for determining independence in the context of acquisitions under section 10901. It urges that a newly created acquiring entity, controlled by or related to a carrier, be considered a carrier if it will connect with a related carrier.[9] The test advocated by RLEA would bring this transaction under section 11343 and result in the mandatory imposition of labor protection without any consideration of the independence of FRVR or the lack of responsibility of the parent in the operation of the line. RLEA has offered no justification for such a test. We believe that our factual review of the relationship of the seller and buyer,

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[9] A similar request by RLEA is pending in Finance Docket No. 31116, *Buffalo & Pittsburgh R.—Exempt.—Acq. & Oper. of Lines in New York and Pennsylvania.*

coupled with a consideration of the exceptional circumstance test adopted in *Class Exempt.*, *supra*, and refined in *Eureka*, *supra*, and our January 29, 1988, decision in this proceeding, is the appropriate method for balancing the needs of all segments of the public, including rail labor, to foster rail transportation and employment needs against other aspects of the public interest.

Finally, RLEA argues that the labor-related conditions in the Agreement contravene the RLA. RLEA submits that the labor-related provisions of the Agreement are contrary to the public interest because they restrict the collective bargaining right of future FRVR employees. In response to this we note the following: first, we fail to see how these closing conditions, negotiated by and applicable to the acquiring and selling entities, can restrict the collective bargaining rights of future FRVR employees. These provisions merely establish under what conditions the sale will be consummated. *Eureka*, *supra*. As such they are perfectly appropriate.

Moreover, as we found in our January 29th decision, in an acquisition by a noncarrier under section 10901, the RLA is superseded by the ICA. Thus, the RLA has no role to play in the consummation of this transaction. *RLEA* v. *ICC*, *supra*; *Burlington Northern R. R. Co.* v. *United Transportation Union*, 848 F.2d 856, 864 (8th Cir. 1988), *reh'g denied*, —— F.2d —— (September 23, 1988). RLEA has presented no evidence that counsels any other result and we conclude that the relief sought by RLEA must be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion of RLEA for modification of the protective order entered in this proceeding is granted to the extent described above.

2. The petitions for revocation filed by MWT and RLEA are denied.

3. This decision is effective on its of service date.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons dissented with a separate expression. Commissioner Lamboley dissented in part with a separate expression.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting

As I stated in my dissent to the decision in this case served January 29, 1988, I believe the majority is tacitly applying an "exceptional circumstances" test which offers labor little opportunity to prevail on the merits of its arguments. I agree with Commissioner Lamboley that further hearing of RLEA"s contentions is warranted.

Additionally, on reexamination of the concerns of MWT, I am convinced that some protection should be provided to forestall the possibility of anticompetitive behavior by ITEL, FRVR, or GBW. I would impose a condition on the purchase that Itel and GBW maintain the Kewaunee interchange as a competitive gateway with service at a level comparable to that now being provided. FRVR states that it would be disadvantageous for GBW to divert MTW cross-lake traffic at this time. Thus, a condition which maintains the status quo would assuage MTW's fears and would not be a burden on GBW.

COMMISSIONER LAMBOLEY, dissenting in part:

I would grant RLEA's petition to reopen this proceeding and institute an oral hearing as the most appropriate process in which to ascertain the merits of RLEA's contentions. In my view, RLEA has raised serious questions concerning true independence in the relationship of FRVR and Itel,[1], and as such, the availability of the 49 U.S.C. 10901 exemption[2] for non-carriers in these circumstances. Such complex issues are inextricably fact bound, and thus warrant an oral hearing to provide the opportunity to examine evidence and witnesses.

Additionally, this represents another case where it is fairly clear that the essence of the dispute in this transaction involves labor relations, not transportation. My view is well known in these instances.[3] This case joins the growing number of other cases wherein the "exceptional" or "extraordinary" circumstances evidentiary showing has *never* been made to the majority's satisfaction. This is unfortunately consistent with earlier treatment accorded these matters by the majority.[4]

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[1] As well as whether FRVR was created exclusively for the purpose of evading the labor protection requirements of 49 U.S.C. 11347.

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Operation of Rail Lines Under 49 U.S.C.* 10901.

[3] See my separate expression in FD No. 30555, *Northwestern Pa. Acq. Corp. & Eureka So. R. Co.—Exempt from 49 U.S.C. 10901 and 11301* (not printed), served July 21, 1988.

[4] See my separate expression in this proceeding, served January 29, 1988.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1436

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES of AMERICA,
Respondents

BEFORE: Edwards, Silberman, and Williams, Circuit Judges

JUDGMENT

[Filed Oct. 30, 1990]

Upon consideration of the record herein, briefs of the parties, this court's decisions in *Railway Labor Executives' Association et al. v. Interstate Commerce Commission*, No. 88-1793, and *Railway Labor Executives' Association et al. v. Interstate Commerce Commission*, No. 89-1183, D.C. Cir. (Sept. 14, 1990), and of the supplemental submissions in response to the order of April 30, 1990, it is

ORDERED and ADJUDGED, by the Court, that the petition for review herein is denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any

timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31116

BUFFALO & PITTSBURGH RAILROAD, INC.—EXEMPTION—
ACQUISITION AND OPERATION OF LINES IN
NEW YORK AND PENNSYLVANIA

Finance Docket No. 31117

GENESEE & WYOMING INDUSTRIES, INC.,
THE ARTHUR T. WALKER ESTATE CORPORATION
AND DUMAINES AND BUFFALO & PITTSBURGH
RAILROAD, INC.—EXEMPTION CONTROL

Decided: June 20, 1989

[Service Date Jul. 10, 1989]

The Buffalo and Pittsburgh Railroad (the B&P), a newly-created corporate subsidiary of Genesee & Wyoming Industries, Inc. (GWI) and the Arthur T. Walker Estate Corporation (Walker), acquired and has begun to operate a 369-mile railroad line in western New York and Pennsylvania. The B&P acquired the line and the

authority to operate it under our class exemption procedure.[1] B&P's corporate parents, GWI and Walker, also sought and were granted an exemption from our regulation in order jointly to control B&P and also to allow B&P to acquire control of two other CSXT railroads, the Clearfield & Mahoning Railway Company (C&M) and the Allegheny & Western Railway Company (A&W).[2] We imposed conditions to protect any employees adversely affected by the control transaction, as required by 49 U.S.C. 11347. We did not impose labor protective conditions on the acquisition.

Two labor unions, the Railway Labor Executives' Association (RLEA) and the United Transportation Union (UTU),[3] have asked us to revoke the exemptions for both the control and the acquisition or, in the alternative, to impose labor protective conditions on the acquisition and operation of the line, and to impose broader protective conditions in the control transaction. A letter-petition for reconsideraiton of the control exemption in Finance Docket No. 31117 was also filed by Anne Marie Costello, County Legislator for Cattaraugus County, NY (the legislator).

By decision served April 7, 1989, the Chairman authorized discovery in this proceeding.[4] Her decision also

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[1] *See* the notice in Finance Docket No. 31116 published in the *Federal Register* on October 26, 1987. The B&P acquired the line from CSX Transportation, Inc. (CSXT) and its affiliate the Buffalo, Rochester & Pittsburgh Railway Company (BRP).

[2] *See* Finance Docket No. 31117, decision served December 28, 1987. The control transaction also involves Dumaines, a New Hampshire trust which owns Walker, and a number of carrier subsidiaries of Dumaines and Walker, discussed below.

[3] UTU's petition included a request for stay which was denied by decision served October 19, 1988. UTU's second request for stay was denied by decision served February 10, 1988. On July 19, 1988, B&P began operations over the line.

[4] UTU's first request for discovery was denied by decision served February 1, 1988. By decision served July 28, 1988, the Chairman

granted CSXT's petition to intervene. B&P and CSXT filed replies to the petitions to revoke.[5] Following discovery, RLEA submitted supplemental evidence and argument, and B&P and CSXT replied. We will deny the petitions to revoke the exemption. We will not impose any labor protective conditions in the acquisition proceeding, and we will not impose extraordinary employee protective conditions in the control proceeding.[6]

BACKGROUND

B&P is a Delaware corporation formed to acquire and operate CSXT's (and its affiliate, BRP's) 200-mile main line between Buffalo, NY and Eidenau, PA. The transaction also encompasses the acquisition and operation of several branch lines, totalling some 169 miles. About 57,000 cars move over these lines per year, with projected revenues of $27 million. The purchase price was $28.5 million.

GWI and Walker each own 50 percent of the capital stock of B&P. GWI is a holding company that controls, through stock ownership, several railroads including the Genesee & Wyoming Railroad Co. (GWRR), the Dansville and Mount Morris Railroad Co. (DMM), and the

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denied motions by RLEA and UTU to compel certain documents. That decision was affirmed by the Commission in a decision served November 7, 1988.

[5] RLEA filed a response to that reply, and B&P and CSXT filed a motion to strike RLEA's response, or in the alternative, for leave to file a response, and RLEA filed a response to the motion to strike. By decision served May 11, 1988, the Chairman denied the motion to strike and admitted all the pleadings.

[6] A hearing on this transaction was conducted by the New York Department of Transportation (NYDOT), and the 250-page transcript of that hearing has been submitted in this proceeding. On July 27, 1988, NYDOT granted B&P a State certificate of public convenience and necessity to acquire and operate the line. Since this transaction involves interstate commerce, we have jurisdiction over it.

Rochester Southern Railroad, Inc. (RS). These railroads are located in western New York, and the RS terminus connects with the northern section of the line acquired by B&P here.

Walker is owned by Dumaines, a New Hampshire trust. (Dumaines also owns 99 percent of the voting stock of Bangor and Aroostook Railroad Company (Bangor).) Walker owns all of the stock of the Pittsburgh and Shawmutt Railroad Company (P&S). The P&S lines parallel in part and also connect to the line acquired by B&P in this proceeding.

B&P's board of directors consists of two directors from GWI and two from Walker. Its officers will be officers or executives of GWI and GWRR. GWI and Walker each contributed $2 million to B&P and received equal shares of stock. That stock has been pledged to the First National Bank of Boston (FNBB) to secure a loan for the purchase price and initial working capital.

CSXT/BRP employed about 220 workers on this line. B&P will employ approximately 160. By the terms of the sales agreement, B&P must offer jobs to at least 160 former employees on the line. Hiring priority will thereafter be given to GWRR and RS employees.

DISCUSSION AND CONCLUSIONS

RLEA and UTU argue that we should revoke the exemptions in both the control and acquisition. They argue that the criteria for revoking exemptions under section 10505(d) have been met for several reasons. We will discuss these arguments in section 1, below.

The main weight of RLEA's and UTU's arguments, however, is not that the exemptions should be revoked altogether, but rather that they should be conditioned to protect the interests of affected employees. These arguments can be grouped under two major headings. First, they argue that the acquisition and operation of

the CSXT line by the B&P is not subject to section 10901 at all, but rather is a transaction between two railroads, and as such is subject to section 11343 (under which we are required to impose labor protective conditions). A variant of that argument is also offered: that the two transactions (the acquisition and the control) are inseparable and that, therefore, the labor protective conditions mandated in the latter must be applied to the former. We will discuss these issues in sections 2 and 3, below.

Second, RLEA and UTU argue that, assuming the acquisition and operation to be properly within the scope of section 10901, we should exercise our discretion to impose labor protective conditions. We have said we will impose protective conditions in section 10901 transactions only in "exceptional circumstances." *See Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Class Exemption*), *aff'd sub nom. Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). We articulated the criteria for exceptional circumstances in Finance Docket No. 31205, *FRVR Corp.—Exemption Acquisition* (not printed), served January 29, 1988 (*FRVR*). We will discuss these arguments in section 4.

1. *Petitions to Revoke the Exemption.*

a. *False Information in the Notice.* UTU contends that the notice contained false and misleading information and should therefore be revoked. First, UTU contends that the notice misled the public about the scope of the transaction. The notice stated that a Class III carrier would be created by the transaction, when actually a Class II carrier was created. Second, UTU alleges the notice was false for not revealing details about a trackage rights agreement with New York, Susquehanna & Western Railroad (NYS&W) to handle double-stack trains.

B&P replies that it has not misled the public because the notice provided all relevant information about the transaction, including the amount of track involved, the affected shippers, and ancillary trackage rights. B&P contends that, for notice purposes, when accurate details are provided about the scope of a proposal, it is not relevant whether a carrier is classified as a Class II or III carrier. It also contends that there is no trackage rights agreement between B&P, NYS&W or CSXT for double-track trains. NYS&W has expressed interest in trackage rights over B&P's line, but no agreemnt has been reached. If such an agreement is entered into, B&P contends, it will file an appropriate application with the Commission.

There is no merit to UTU's contention that the notice contained false and misleading information. All relevant information was provided in the notice and the scope of the transaction was clear. Accordingly, whether B&P would be a Class II or III carrier was not material error which would cause the notice to be void.

We note that subsequent to the notice in this proceeding, *Class Exemption* was modified by decision served February 29, 1988 (*Class Exemption II*) to provide a longer notice period and more information when a transaction will involve a Class I or II carrier. However, in this proceeding, we authorized discovery, parties had an opportunity to obtain evidence, and to submit further evidence and arguments.[7] Indeed, the parties have more information about this transaction than they would have under *Class Exemption II*. Finally, we note that there was no misleading information concerning trackage rights with NYS&W, since no such agreement exists.

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[7] UTU participated in the NYDOT hearing. That hearing also provided an opportunity to obtain supporting data and details about the transaction which could form the basis for arguments before this Commission.

b. *Viability.* UTU contends that its main concern in this proceeding is the viability of the new B&P. (We assume this is a rail transportation policy-related argument. *See* 49 U.S.C. 10505(d).) It notes that this was the major focus of the NYDOT hearing. UTU is concerned that valuable double-stack traffic and coal may be diverted from B&P, and that not enough money has been allocated for purchasing locomotives.

UTU has made unsubstantiated, hypothetical arguments about the loss of certain traffic. B&P would, of course, have no reason to acquire the line if its prospects were as bleak as UTU alleges. We note that NYDOT, after a full hearing on the viability of the line, granted a certificate to B&P. The record before us includes traffice and revenue and expense projections indicating that B&P expects to be profitable, even in its first year of operation. UTU has provided no support for its concerns that would justify our questioning B&P's projections for a productive, efficient, and profitable operation centered on meeting the needs of local shippers.

In her letter petition, the legislator also expresses concern about the viability of B&P's operations. As discussed above, the mere allegation about the amount of overhead traffic that may be diverted is not compelling enough for us to substitute our judgment for B&P's assessment that it can operate this line profitably.[8] (The legislator's argument that more information is needed to assess these proposals was mooted by our authorizing discovery.)

c. *Limited Scope and Rail Transportation Policy Criteria.* UTU argues that the class exemption and the control exemption should be revoked because one of the key

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[8] The legislator also expresses concern about the viability of regional operators in general. We discussed this concern in some detail in *FRVR*, *supra*, at 2-3, where we explained that our policy of encouraging new regional carriers has been successful—new railroad formation has quickened, and service has been maintained and typically improved.

requirements of 49 U.S.C. 10505 has not been met. It contends that because B&P projects revenues of a Class II carrier, rather than a Class III carrier, the transaction is not of limited scope.

However, the criteria for revocation at 49 U.S.C. 10505(d) address rail transportation policy (RTP) issues, not the added exemption criteria of either limited scope or inability to abuse market power. That is, to exempt we must make an RTP finding and either a limited scope or inability to abuse market power finding. To revoke, the first criterion applies. This challenge is also a collateral attack on *Class Exemption* and *Class Exemption II*, where we made the necessary section 10505 findings.

Moreover, the limited scope finding, as noted above, is one of two alternative findings that may be made in connection with an RTP finding to support exemption. If we find no possibility of abuse of market power, we need not find limited scope. Even if a limited scope finding were a prerequisite, the size of a carrier, its revenues, and even the length of the involved line are not determinative of whether a transaction is of limited scope. We have affirmed the use of the class exemption in a transaction that created a Class II carrier operating a longer line segment than involved in this proceeding. *See* Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption Acq. and Oper.—Certain Lines of Burlington Northern R. Co.* (not printed), served May 26, 1988. This proposal involves fewer than 400 miles of track to be operated by a regional carrier, and the common control by GWI, Walker, and Dumaines will not affect the local nature of B&P's operations. Thus, UTU has not shown that the impacts of this proposal are such that it is not of limited scope.[9]

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[9] UTU also contends that the exemption should be revoked because discovery was denied. As a corollary, it argues that without more evidence it could not make a market abuse inquiry. Discovery

Further, UTU contends these proposals are not consistent with the RTP because of the impacts on labor and, therefore, the exemptions should be revoked. Impact on labor is but one policy consideration by the RTP. As discussed in the following sections, we have consistently found that these line sales exemptions promote many RTP goals. For example, the class exemption generally promotes 49 U.S.C. 10101a(2) (minimizing the need for regulation), 10101a(3) (promoting revenue adequacy), 10101a(4) (ensuring a sound transportation system to meet the needs of the public and the national defense), 10101a(5) (fostering sound economic conditions), and 10101a(7) (to reduce barriers to entry and exit). In this case, UTU claims an adverse impact on labor but, as discussed *infra*, fails to quantify that impact, and almost four-fifths of the former employees were to be offered jobs by the line's new owner. While there may be some labor dislocation and changes in working conditions, we cannot find on this record that revocation is warranted under the criteria of section 10505(d).

2. *Section 11343 versus Section 10901.*

RLEA contends that, due to the intra-corporate relationships involved here, B&P was already a railroad rather than a new corporate entity when it acquired this line. Therefore, it contends, this is a sale between a carrier and a group of carriers, subject to 49 U.S.C. 11343 and, accordingly, requiring imposition of employee protective conditions under section 11347.

RLEA notes that in recent cases the Commission has determined a newly formed entity's status by looking to indicia of the acquiring entity's independence from its parent corporation to determine whether the acquiring carrier was in fact formed exclusively to elude the otherwise applicable provisions of section 11343. *See* Finance

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was granted in this proceeding, and in conjunction with the NYDOT hearing, relevant operational and financial data was available.

Docket No. 30629, *Staten Is. R. Corp.—Exemp. from 49 U.S.C. 10901; Delaware Otsego Corp. and Staten Is. R. Corp.—Exemp. from 49 U.S.C. 11301* (not printed), served July 18, 1985 (*Staten Island*), *aff'd sub nom., Railway Labor Executives' Association v. U.S.*, 791 F.2d 994 (2d Cir. 1986) (*RLEA v. U.S.*); and Finance Docket No. 30779, *Rochester & S. R., Inc. and Genesee and W. Indust., Inc.—Exemp. from 49 U.S.C. 10901, 11301, and 11343* (not printed), served July 13, 1986 (*Rochester & Southern*), *aff'd sub nom. Railway Labor Executives Ass'n v. ICC*, 819 F.2d 1173 (D.C. Cir. 1987) (*RLEA v. ICC*).

Although in these cases we found, and the courts affirmed, that the new entities were noncarriers, RLEA points to factors it argues distinguish the instant case and require the Commission to ignore the allegedly separate corporate status of B&P and revoke the section 10901 exemption. RLEA points to the contribution of $2 million each by GWI and Walker in return for B&P stock which will be pledged as collateral for the loan with FNBB, and to the fact that all of B&P's assets will also be pledged as collateral. Another cited factor is what RLEA describes as a "loan agreement" between GWI and FNBB, that should be between B&P and FNBB. Thus, it contends, B&P is not financially independent and its obligations to FNBB are "guaranteed" in part by GWI and Walker.

RLEA also points to the fact that B&P is run by officers and directors of GWI and Walker, and that B&P will be operationally related to other subsidiaries of GWI and Walker. For example, B&P connects with the RS, a GWI subsidiary, and with the Walker subsidiary, P&S. In addition, B&P does not have its own sales or marketing staff, but will contract with the GWI subsidiary, GWRR, for those services. Also, B&P will rely on the P&S and GWI, Leasing (another subsidiary of GWI) as

sources for additional rail cars, and may even hire employees from RS and GWRR.

Further, RLEA contends that B&P's acquisition resulted from a right to purchase this line that came about because of a prior acquisition by RS of CSXT's Rochester to Ashford, NY line. In connection with the RS transaction, GWI acquired the right of first refusal to purchase the line involved here.

RLEA concludes that all of these factors demonstrate that B&P is not independent of its parents and affiliated corporations, and therefore it must be treated as a carrier. Accordingly, this transaction would be covered by section 11343 and not 10901.

RLEA correctly notes that *Rochester & Southern* and *Staten Island*, *supra*, are the lead cases where we set forth the analysis for determining whether a newly formed corporate entity is sufficiently independent of its corporate parent so as to treat it as a noncarrier under section 10901. In affirming *Rochester & Southern* in *RLEA v. ICC*, the D.C. Circuit stated at 1173:

> [T]he ICC is not *compelled* to ignore corporate formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient *indicia of independence*. (Last emphasis added.)

In *Rochester & Southern*, RS, a newly formed entity, was wholly owned by GWI. RS issued all of its stock to GWI in exchange for cash and other assets. In that proceeding, RLEA raised the same arguments it has raised in this proceeding. We rejected those arguments (at p. 5) and concluded:

> Although a control relationship exists between RS and GWI, it does not warrant a finding that they are one and the same and that section 11343 applies. There is no evidence to suggest that RS was formed

> exclusively to elude the otherwise applicable provisions of section 11343. To the contrary, the evidence suggests that RS was formed to distance GWI from the risks RS would assume upon commencing operations. RS has assumed all the risks of the venture on its own and is not financially guaranteed by its parent. Given the above indications of independence, we must conclude that RS is a new enterprise and a noncarrier. . . .

Likewise, in *Staten Island* a new subsidiary was created to acquire and operate a rail line. There, the parent corporation negotiated with the seller for the sale of the line to its subsidiary, shared common officers and directors with the subsidiary, and also took steps to hire employees for the new company. Moreover, in *Staten Island* the parent guaranteed payment of the acquiring subsidiary's financial obligations to the seller. The Commission found, and the court affirmed, that the new entity and not the parent had assumed the risks of the venture, that the entity had been created for a legitimate business purpose, and accordingly the new entity was not a carrier and the acquisition was governed by section 10901. *RLEA v. U.S.*, *supra*, at 1006.

Here, B&P, a newly formed corporation, will own and operate the line, and will publish tariffs and hold out service in its own name and for its own account. B&P will conduct its own operations on the line and directly serve the line's shippers. It will be responsible for its own financial and contractual obligations and acquire equipment and materials in its own name and for its own account. B&P will hire its own employees, and will have officers and directors who will be named in accordance with State law.

This acquisition has not been financially guaranteed by GWI and Walker, and therefore there is less involvement than in *Staten Island*, where the parent corporation actu-

ally quaranteed payment of the acquiring subsidiary's financial obligation to the seller. GWI's and Walker's pledge of their B&P stock as security for the FNBB loan to B&P imposes no responsiblity for B&P's liabilities on the parent corporations. This pledge merely permits FNBB more easily to take control of B&P's assets if B&P defaults on the loan. Moreover, the loan commitment letter (not the "loan agreement" as alleged by RLEA) from FNBB to GWI does not negate B&P's financial independence—it provides no guarantee to FNBB by the parents of B&P's future indebtedness, and is simply a statement by FNBB of its willingness to lend funds to B&P. The fact that the letter was sent to one of B&P's two controlling shareholders does not show B&P is not financially separate.

Likewise, B&P's initial capitalization by GWI and Walker does not show that it is not a separate corporation, responsible for its own debts. B&P alone is financially responsible for its own operations, indebtedness, and contracts, and the only risk assumed by GWI and Walker is to the extent of their initial capital contributions to B&P.

In both *Staten Island* and *Rochester & Southern* the parents and subsidiaries shared common officers and directors. In *Staten Island*, the parent corporation took steps to hire employees for the corporation. Also, in *Staten Island*, like GWI's acquisition of the right of first refusal from CSXT here, the parent corporation negotiated with the seller for the sale of the line to its subsidiary.

The fact that the B&P line will connect with related rail carriers does not indicate that they are one and the same company. Also, that B&P may hire some employees from GWRR and RS does not prove this either. The parent company, GWI, has an interest in seeing that B&P is fully and properly staffed. (GWI has authority to control B&P, and this is merely a lawful incident of that control.)

Finally, the right of first refusal acquired by GWI and later exercised by B&P is not determinative of whether B&P is a separate entity. The right of first refusal says nothing about whether they are now operated as separate companies. And unlike those cases where all the stock was owned by one corporate parent, GWI and Walker are each 50 percent shareholders, and each has equal representation on the Board of Directors. Thus, there are good business reasons for B&P to be separately incorporated.

RLEA argues that the Commission should broaden its definition of "rail carrier" to include non-carrier affiliates of carriers. It contends that under the current analysis there is virtually no situation where a subsidiary or affiliate of a carrier would be considered a carrier. Thus, RLEA argues, any carrier can evade section 11343 and the labor protective conditions required by section 11347 by creating a subsidiary to acquire rail lines.

The plain language of section 11343 shows that it applies only to the acquisition of property of another carrier by a carrier or carriers. Section 11347 gives mandatory labor protection for employees that are affected by such consolidations. Where a new entity is formed for the sole purpose of evading application of section 11343 and the transaction is a "sham" to conceal a rail consolidation, we have discretion to apply section 11343. But here, there were good business reasons to form a new business entity to acquire this carrier property. The mere change in ownership from a Class I carrier to a noncarrier does not affect a consolidation of carrier properties.

Not imposing costly employee protective conditions on such transactions enables rail carriers to sell marginally profitable lines to new regional or shortline carriers who may operate the lines more economically. The result is that rail service is preserved, the new railroad provides employment prospects for affected employees, and a major rail carrier is relieved of an economically draining line. *See Class Exemption, supra,* at 813.

Labor protection for affected employees is only one of many conflicting concerns of the RTP. This concern must be balanced against the benefits, discussed above, resulting from not imposing employee protection on acquisitions by new carriers. The courts have affirmed the balance we have struck, and RLEA has presented no sound legal or policy argument for us to modify it.

3. *The Relationship between the 11343 Control Proceeding and the 10901 Acquisition Proceeding.*

RLEA also argues that when employee protective provisions are imposed on a control transaction under section 11343, section 11347 then becomes applicable, and that provision requires protection for *all* employees who are adversely affected by the transaction, regardless of whether they are employees of the carrier seeking Commission authorization for the transaction. RLEA contends that labor protection imposed by the Commission in the control transaction must be applied to benefit employees affected by the acquisition because the acquisition is part of an inseparable arrangement. The union concludes that the two transactions here are inseparable and, accordingly, CSXT/BRP employees are affected by the control transaction and employee protection imposed in the control proceeding should apply to those employees.

RLEA's arguments are without merit and are contrary to Commission and court precedent.[10] We recently

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[10] RLEA cites several old Commission decisions under former sections 1(18) (now 10901) and 5(2) (now 11343) in which employee protection was mandated for employees of carriers involved in the section 1(18) transaction. These cases predate our 1982 clarification of policy on labor protection for new short line and regional carriers. *See Knox and Kane R. Co.—Petition for Exemption*, 366 I.C.C. 439 (1982) (*Knox and Kane*). Moreover, those decisions, for the most part, concern the imposition of labor protection on a carrier directly involved in a transaction when that carrier's employees were affected directly and not through another transaction for which separate statutory approval was required. *Texas and Pacific Ry.*, 247 I.C.C. 285 (1941); *Gulf, Mobile & Ohio*

rejected this argument in a case where the relevant facts were virtually identical to those in this case. *See* Finance Docket No. 31206, *Itel Rail Corporation and Itel Corporation—Continuance In Control Exemption—FRVR Corporation* (not printed), served September 12, 1988, at p. 3 (*FRVR-Control*). We explained there that the control transaction directly affects only employees of carriers in the commonly controlled system and those employees are protected under *New York Dock*. The seller is not a party to the control transaction and its employees are not directly affected by it, unless, of course, they have become employees of the new carrier. Likewise, here, the fact that CSTX/BRP was the vendor in the acquisition transaction provides no basis for providing protection for its employees in the control proceeding.

We have consistently rejected the argument that employee protection should be extended to employees of carriers not party to the section 11343 transaction which gave rise to the mandatory protection. *See Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984); *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 292, 344 (1982); and *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-950 (1980). This policy was explained in detail in *FRVR—Control*, *supra*, and it has been affirmed by the courts.[11] As we noted in *FRVR—Control* at 3, in *Crounse*

Railroad Company, 282 I.C.C. 311 (1951); *Louisiana & Arkansas Railway Co.—Abandonment*, 290 I.C.C. 434 (1954); *New Orleans Passenger Terminal*, 267 I.C.C. 763 (1948); and *Seaboard Air Line R. Co. Trackage Rights*, 312 I.C.C. 797 (1962).

[11] RLEA points to two court cases which it argues support its position: *RLEA v. United States*, 216 F.Supp. 101 (E.D. Va. 1963) and *Soo Line Railroad Co. v. United States*, 280 F.Supp. 907 (W.D Minn. 1968). The Commission and the courts have consistently refused to follow these cases. *E.g. Missouri-Kansas, Texas R. Co. v. United States*, 632 F.2d 392, 411, fn. 46 (5th Cir. 1980); and *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 324, fn. 62 (D.C. Cir. 1983).

Corp. v. I.C.C., 781 F.2d 1176, 1193 (6th Cir., 1986), the court stated that ". . . every court of appeals that has considered the question has concluded that section 11347 does not apply to employees not directly involved in the transaction (citated omitted)." *Accord* Finance Docket No. 31186, *MidSouth Corporation—Continuance in Control Exemption—Southeastern Rail Corporation* (not printed), served February 12, 1988, *aff'd mem. sub nom. RLEA v. ICC*, U.S.C.A. 6th Cir. No. 88-3311 (March 17, 1989).

We note that this policy does not, however, deny RLEA an opportunity to justify employee protective conditions in the acquisition proceeding. *See FRVR—Control*, *supra*, at 3-4. RLEA may petition for protective conditions, and it has the burden of showing that exceptional circumstances require the imposition of discretionary protective conditions. It has done so in this case, and we will discuss these arguments now.

4. *Discretionary Employee Protective Conditions.*

RLEA contends that, if we find that the acquisition is properly covered by section 10901, we should exercise our discretion and impose protective conditions on either B&P or CSXT. It relies on *Class Exemption*, *supra*, at 815, where we stated:

> If an exceptional showing of circumstances justifying the imposition of labor protection is made, the Commission is empowered to revoke the exemption, . . . and impose labor protection.

RLEA contends that it has made an exceptional showing. As a result of this transaction, it argues, between 60 and 140 individuals will lose their jobs, and those employees who are hired by B&P will suffer a 15 percent reduction in compensation.

RLEA also contends that the Commission's reasons for not imposing conditions in the class exemption are not

relevant here. There we stated that employee protective conditions result in increased costs, discourage sales, and thus may result in deterioration of a line and later abandonment. Since CSXT had not threatened to abandon the line involved here, RLEA contends that reasoning is not applicable. In addition, it is argued that all of the railroads involved here will obtain substantial benefits from this transaction; therefore, RLEA claims, the Commission can not assume that employee protective costs are too burdensome or that the costs would thwart the transaction.

RLEA has the burden of proof to show that exceptional circumstances warrant the imposition of employee protective conditions. In *FRVR*, we explained that we might find exceptional circumstances and impose labor protection if we find: (1) that there was a misuse of Commission rules or precedent; (2) that existing labor contracts specified that line sales were subject to procedural or substantive protection; or (3) that injury to affected employees was unique, disproportionate to the gains achieved for the local transportation system, and that the injury could be compensated for without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales. *See FRVR* at 3-4.

First, we find no misuse of our rules here. As discussed above, the sale and control transactions were proper and implemented according to our rules.

Second, RLEA has submitted nothing to indicate that any existing labor contract requires protection for CSXT/BRP employees affected by the sale at the level of *New York Dock* (the level of protection imposed in the control proceeding). The record does indicate that B&P is offering employment to almost two-thirds of the affected employees, and that others are eligible for protective benefits under their current collective bargaining agreements with CSXT.

Third, we do not find the injury to be unique or disproportionate to the gains achieved, or that compensation for the injury would not result in termination of the transaction. RLEA has not shown the specific scope of the impacts on affected employees. B&P has been operating this line since July 19, 1988, and specific information about the impact on employees should now be available (in particular how many employees are affected and what further protection is desired beyond that provided by the relevant collective bargaining agreements).

CSXT's claim that labor protection might cost as much as $60 million is overstated. It bases this figure on the assumption that 225 employees will receive dismissal allowances for 6 years (CSXT's answer to Second Interrogatories at 3). The evidence indicates that there are 212 active employees (Massie Aff., at 2). Moreover, CSXT's calculation does not take into account B&P's commitment to offer jobs to 160 CSXT employees. However, even if fewer employees were affected, the cost of labor protection would be high, and CSXT has stated that, if the sale is too costly, the transaction would be thwarted (Massie Aff., at 5). Without more evidence on this point, we must conclude that RLEA has not met its burden to show that the cost of labor protection would not preclude this transaction.

The question of whether the injury to labor is unique has not been addressed; the evidence in this proceeding was filed before *FRVR*, was issued. There is no evidence, however, to distinguish this sale from others where no employee protective conditions were imposed on the seller.

CSXT and B&P have made a good faith effort to protect labor by including in their contract a requirement that jobs be offered to at least 160 out of 212 CSXT employees affected. RLEA has made no effort to show the true extent of the injury to employees—they have not quantified the actual adverse effects of the transaction on employees, for

example, by discussing other severance arrangements that are available.

Contrary to RLEA's arguments, the line involved here is clearly the type of line to which *Class Exemption* was designed to apply. The possibility of abandonment discussed in that rulemaking need not be imminent. As we explained there, in *Knox and Kane, supra*, and in Finance Docket No. 30555, *Northwestern Pacific Acquiring Corp. and Eureka Southern R. Co.—Exemption* (not printed), served January 8, 1988 (*Eureka*), our concern is that the cost of employee protective conditions might discourage the sale of marginal rail facilities and thus result in a carrier continuing to operate a line while deferring maintenance (thereby minimizing out-of-pocket losses). The line would then continue to deteriorate until it was no longer marketable and abandonment would be the only option. We concluded in *Eureka*, at p. 4:

> . . . [R]ail carriers should be encouraged to sell lines they could not profitably serve or were not interested in serving to entities who would continue to operate them.

CSXT's sale of this line to a newly created carrier to operate fits squarely within the type of line we intended to be covered by the class exemption.

RLEA also claims that employee protective conditions are appropriate because the carriers involved in the transactions, as well as related subsidiaries, will benefit from the transaction. But, the benefits that may accrue might be negated by the cost of labor protection. As for B&P, we have determined that it is embarking on this venture as an independent corporate entity; it will be wholly responsible for losses and it alone will enjoy profits. As we have stated in several recent cases, the financial burden of starting a new operation is great enough without routinely increasing that burden with employee protection.

We conclude that labor has not shown exceptional circumstances that warrant discretionary imposition of labor protection on either the buyer or the seller.[12] The acquisition proposal here is in the public interest overall, notwithstanding that it will have some adverse impacts on affected employees. The scope of these adverse impacts is unclear, and, overall, rail labor will benefit by the preservation of jobs and the additional employment opportunities that will arise if B&P is successful. *See Eureka*, *supra*, at 11.

RLEA and UTU have failed to carry their burden of proof to show either that the exemptions should be revoked or that the Commission should impose extraordinary conditions. Accordingly, the petitions are denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions to revoke or for reconsideration are denied. RLEA's and UTU's requests for employee protective conditions in Finance Docket No. 31116 are denied.

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[12] RLEA also argues that protective conditions should be imposed on the seller, CSXT, in this instance because it is abandoning service on a rail line, an act which would require protection under 49 U.S.C. 10903(b)(2). In *Knox and Kane*, *supra*, we enunciated the policy not to impose employee protective conditions routinely on the seller in an acquisition proceeding. Since then, we have consistently rejected the request that employee protective cost be born by the seller, and we have firmly rejected the comparison of a sale to an abandonment. *See* Finance Docket No. 30457, *San Diego & Imperial Valley Railroad Co. Inc.—Exemp.—From 49 U.S.C. 10901 and 11301* (not printed), served July 27, 1988, at 8, and *Eureka*, *supra*, at 4, fn. 5. In those cases, we discussed in detail our discretion under section 10901 concerning these conditions, and we found that the public interest requires us to encourage the sale of marginally profitable lines in lieu of abandonment. As discussed above, RLEA has not shown exceptional circumstances warranting employee protection, nor has it shown why we should alter our established policy against imposing the costs of protection on the seller.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting:

The majority again applies the "exceptional circumstances" test in a manner which effectively precludes petitioners from prevailing on the merits of their arguments. At the least, I believe a more thorough weighing of labor interests is called for. The majority dismisses the issue of the extent of injury to affected employees with a burden of proof analysis. I believe we have some responsibility to quantify that injury before making our decision. This is especially true in the context of the instant transaction where an abandonment seemed far from imminent. With annual volumes of 57,000 cars and revenues of $27 million, the balance of public interest concerns associated with Section 10901 sales does not weigh so heavily in favor of an unencumbered transaction.

COMMISSIONER LAMBOLEY, dissenting:

I cannot now join my colleagues in disposition of the current issues, just as I have not been able to do so previously in this case. My reasons are several.

First, I fail to view discovery as a mere procedural matter. It is a significant and substantial method for the development and presentation of evidentiary facts and argument essential to the causes of all litigants, and it

is basic to the Commission record and decision, irrespective of positions advocated. In this case, as in others, I find that the majority takes an unduly narrow view by denial of discovery requested.[1] Considering the burden of proof, denial unnecessarily and unfairly compromises the ability of the employees to submit the best possible case.[2]

Second, the transactions in this case, as have others, claim the benefits of class exemption of Ex Parte No. 392 (Sub-No. 1)[3] which blends the acquisition under § 10901 and exemption authority of § 10505. Here, however, it is not altogether clear that only § 10901 is relevant. Transactions may frequently involve aspects of both § 10901 and § 11343. The line of demarcation is not always clearly defined. In short, transactions may involve both § 10901 and § 11343 since the statutes are compatible and are not to be construed as mutually exclusive.[4] The corporate structuring and integrated nature of the transactions involving carrier enterprises may qualify for consideration under § 11343. Denial of discovery may well have constrained the opportunity to more fully demonstrate the interrelationship.[5]

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[1] See my dissent to *Decision* (not printed), served November 7, 1988.

[2] The administrative process need not curtail discovery on the grounds of efficiency. Proceedings in this case, as in others, demonstrate the lack of efficiency and generation of appellate issues inherent in *denials* of discovery.

[3] Ex Parte No. 392 (Sub-No. 1) *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[4] See *People of Illinois v. I.C.C.* 604 F.2d 519 (7th Cir. 1979).

[5] Proceedings in the State of New York referred to by the majority, did not have the benefit of discovery and document production as the ALJ there noted. The Commission decision on discovery requests was pending. *Transcript* of Proceedings Case No. 30802 NY DOT, November 19, 1987 p. 242.

Third, the class exemption of Ex Parte No. 392 (Sub-No. 1) is not promised on a "limited scope" finding under § 10505(2)(A). However, the majority refers to and discusses this transaction in terms of that proviso. By so doing, the majority, in my view, effectively removes the case from the class exemption and its related assumptions and findings. The case is treated as if it were a case specific exemption transaction.[6]

Finally, I continue to be disappointed by the Commission's approach which routinely denies consideration of fashioning of labor protection conditions (LPC) in transactions presented under the § 10901 class exemption of Ex Parte No. 392 (Sub-No. 1).[7] The "discretionary" policy not to impose LPC except in "exceptional or extraordinary circumstances" has *never* been exercised in favor of doing so in *any* case decided by the Commission since issuance of Ex Parte No. 392 (Sub-No. 1).[8] The "weighing and balancing" of respective interests of prior precedent has now been discarded. *Cf. Knox & Kane Railroad Co.—Gettysburg R. Co.—Petition for Exemption Under 49 U.S.C. 10505 from 49 U.S.C. 10901, 11343 and 11301*, 366 I.C.C. 439 (1982). The evolution from automatic *imposition* has now given way to automatic *denial* of conditions.

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[6] The majority engaged in similar reasoning in a recent decision involving the Chicago, Missouri & Western. See FD No. 30911, *Chicago, Missouri & Western Ry. Co.—Exemption Acquisition and Operation—Illinois Cen. & Gulf R. Co.*, (not printed), served June 21, 1989.

[7] Note, supra note 3.

[8] The exemption cases now exceed 166 in number and include some 30 (counting this proceeding) protested or contested cases. In every one of the contested cases, as well as the uncontested, no attempt to craft conditions was made. A majority of the Commission simplistically views the choice of conditions as being *New York Dock* or none, and chooses the latter. In each case I have dissented in part regarding disposition of labor related issues. See cases listed in Appendix A.

In my view, matters requiring analysis of the relative benefits, burdens and consequences have been dealt with in summary fashion, by consistent denial, with various explanations attempted upon judical remand to the Commission. The results, however, have been uniform, *no* conditions of *any* kind have been imposed on *any* party in any case involved in an exempt transaction under § 10901. No distinction or allocation of responsibility is made between the status of *seller* and *buyer* relative to the assessment of the impact of the sale transaction on the *seller's* employees, and its statutory and/or contractual relations under the Railway Labor Act (RLA).

Appropriate accommodation of transportation and labor laws can be achieved, as it has for the past 50 years, without asserting claims of pre-emption. The statutory policies and purposes of the Interstate Commerce Act (ICA) and Railway Labor Act (RLA) can be reconciled, construed and implemented harmoniously consistent with public interests involved in § 10901 transactions, as has been done in other transportation transactions.[9] Employee protective conditions have been the vehicle which bridges the statutory scheme of the ICA and RLA called into play by transactions such as here. I believe conditions can and should be fashioned that contain both *procedural* and *substantive* provisions appropriate to the circumstances. This analytical effort, the majority has routinely declined to undertake.

In my view, the majority again not only fails to fairly evaluate the case before us, but fails to take advantage of the opportunity for constructive resolution of what has become a continuing and destabilizing problem in transactions invoking the class exemption of Ex Parte No. 392 (Sub-No. 1).

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[9] See *Pittsburgh & Lake Erie R. Co. v. RLEA*, —— U.S. —— (Case Nos. 87-1589 and 87-1888, decided June 21, 1989 Slip op. at 17, 19) in which the Court makes clear that the ICA and RLA are not in conflict, and should be construed harmoniously.

As it has in other cases, for purposes of cost/benefit analysis the majority concedes that the seller's evidence regarding the cost is obviously and substantially overstated. Nevertheless, the majority refuses closer scrutiny and cements its position of denial by imposing an enhanced evidentiary burden on the employees for all aspects of protective condition considerations.

APPENDIX A

See decisions, and separate expressions in:

Ex Parte No. 392 (Sub-No. 1), *Class Exemption for The Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Finance Docket No. 30628, *Lackawanna County Railroad Authority, Inc.—Exemption From Regulation*, (not printed) served February 11, 1986.

Finance Docket No. 30764, *Arkansas and Missouri Railroad, Et Al.—Exemption From 49 U.S.C. 10901, 11301, 11322 and 11343*, (not printed) served July 17, 1986 and February 9, 1987.

Finance Docket No. 30779, *Rochester and Southern Railroad, Inc.* and *Genesee and Wyoming Industries, Inc.—Exemption From 49 U.S.C. 10901, 11301, and 11343*, (not printed) served July 18, 1986.

Finance Docket No. 30754, *Huron and Eastern Railway Company—Exemptions*, (not printed) served September 12, 1986.

Finance Docket No. 30789, *Indiana Rail Road Company—Exemption—Acquisition and Operation*, (not printed) served October 10, 1986 and April 16, 1987.

Finance Docket No. 30861(A), *City of Austin, TX—Acquisition—Southern Pacific Transportation Company*, (not printed) served November 4, 1986.

Ex Parte No. 395 (Sub-No. 1), *Keokuk Northern Real Estate Company and Keokuk Junction Railway Company —Election of Exemption*, (not printed) served November 28, 1986 and May 5, 1987.

Finance Docket No. 30911, *Chicago, Missouri & Western Railway Company—Exemption Acquisition and Operation*

—*Illinois Central Gulf Railroad Company*, (not printed) served December 5, 1986 and May 12, 1987.

Finance Docket No. 30891, *Paducah & Louisville Railway, Inc.—Acquisition and Operation Exemption—Illinois Central Gulf Railroad Company*, (not printed) served May 11, 1987.

Finance Docket No. 31059, *Central Michigan Railway Company—Acquisition and Operation—Certain Lines of Grand Trunk Western Railroad Company*, (not printed) served September 4, 1987 and December 10, 1987.

Finance Docket No. 30915, *Otter Tail Valley R. Co.—Acq. & Optn. Exemption—Burlington Northern R. Co.* (not printed), served July 2, 1987 and January 22, 1988.

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APPENDIX F

STATUTES RELIED UPON

INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 10505

49 U.S.C. § 10505

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope; or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707

of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

B. Section 10901

49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

C. Section 11343.

49 U.S.C. § 11343

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for

the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and person affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter re-

lated to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition or control provisions of this subchatper if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be

adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

D. Section 11347.

49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

(2)

No. 90-1127

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission reasonably determined that corporate subsidiaries newly formed to acquire lines of railroad were non-carriers under 49 U.S.C. 10901 because their parent companies did not exert operational control over them, and because the subsidiaries were not formed to evade labor protective obligations applicable to the parent.

2. Whether the Interstate Commerce Commission permissibly concluded that 49 U.S.C. 11347 does not require the imposition of labor protection conditions for employees of railroads that were not parties to control transactions authorized pursuant to 49 U.S.C. 11343.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1127

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the *FRVR* case (Pet. App. 1a-19a) is reported at 914 F.2d 276. The order of the court of appeals in the *B&P* case (Pet. App. 52a-53a) is unreported. The decisions of the ICC in the *FRVR* case (Pet. App. 20a-34a and 35a-51a) are unreported. The ICC decision (Pet. App. 54a-83a) in the *B&P* case is unreported.

JURISDICTION

The judgments of the court of appeals were entered on September 14, 1990 and October 30, 1990 (Pet. App. 52a). On December 4, 1990, Chief Justice Rehnquist signed an order extending the time within which to file a petition for a writ of certiorari to and including January 14, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 10901 of the Interstate Commerce Act (the Act) requires that a noncarrier seeking to acquire or begin operations over any rail line must first secure the authorization of the ICC.[1] Alternatively, a noncarrier may seek an exemption from the approval process under regulations issued pursuant to 49 U.S.C. 10505. See 49 C.F.R. 1150.32(b); *Ex parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), aff'd *sub nom. Illinois Commerce Commission* v. *ICC (Class Exemption)*, 817 F.2d 145 (D.C. Cir. 1987) (Table). See *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2591 (1989). In a rail line acquisition approved under Section 10901 or exempted from approval under Section 10505, the ICC has discretion whether to impose labor protec-

[1] Although 49 U.S.C. 10901 refers to transactions involving "rail carrier[s]," regulations and judicial decisions have required noncarriers to comply with its provisions. See 49 C.F.R. 1150.1(a) (1987); *Black* v. *ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985); *In re Chicago, M., St. P. & Pac. R.R.*, 658 F.2d 1149, 1169 (7th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

tive conditions for the benefit of employees affected by the transaction. 49 U.S.C. 10901(e).

Section 11343 requires that a rail carrier or a person that controls rail carriers must obtain the ICC's prior approval and authorization for the acquisition of control of another rail carrier. 49 U.S.C. 11343. In a transaction approved pursuant to Section 11343, the statute mandates the imposition of labor protective conditions for the benefit of employees affected by the transaction. 49 U.S.C. 11347. The conditions imposed by the ICC generally include reemployment rights, severance pay, continuation of fringe benefits, and moving allowances and displacement allowances for up to six years. See *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

2. a. Itel Rail Corporation (Itel Rail), a subsidiary of Itel Corporation (Itel), controls several rail carriers. The FRVR Corporation (FRVR), a wholly owned subsidiary of Itel Rail, was formed in 1987 to purchase the "Duck Creek South" rail line from the Chicago & North Western Transportation Company (C&NW). Duck Creek South consists of about 200 miles of line and trackage rights located between Green Bay and Milwaukee, Wisconsin, which serve as feeder lines for C&NW and other railroads. Pet. App. 4a-5a. Before the acquisition, FRVR was not subject to ICC regulation. The purchase price for Duck Creek South was approximately $61 million. Itel or Itel Rail provided $14 million in the form of an equity contribution; the balance was derived from a loan secured by the acquired assets and guaranteed by Itel Rail. Pet. App. 4a-5a.

b. Because the purchase of the Duck Creek South line made FRVR a rail carrier subject to ICC regulation, Section 11343(a)(5) required Itel and Itel Rail to seek ICC approval for their right to continue to

control FRVR. Relying on Section 10505, they petitioned the ICC for an exemption from Section 11343's prior approval requirement. The ICC granted the exemption, and as required by Section 11347, imposed labor protective conditions. Pet. App. 20a.

In a petition for reopening for clarification or reconsideration of that decision, petitioner RLEA argued that Itel Rail's continued control of FRVR was inextricably linked to FRVR's acquisition of C&NW's line. Therefore, in RLEA's view, not only employees of the Itel system, but also C&NW employees, must be afforded the labor protections required by Section 11347. Pet. App. 22a. The ICC rejected that contention, finding that the only employees entitled to labor protection under Section 11347 were those of the Itel system, since those companies alone were party to the transaction at issue. The ICC also held that arguments that C&NW employees should be protected because the control transaction was inextricably tied to the acquisition transaction would be addressed in RLEA's separate petition claiming that the acquisition was invalid because FRVR was simply an alter ego used by the Itel companies to evade otherwise-applicable labor protective conditions. Pet. App. 23a-26a.

c. As a noncarrier acquiring a rail line, FRVR was required to obtain ICC approval of the purchase of the Duck Creek South line under Section 10901, unless exempted from that requirement under Section 10505. FRVR and C&NW applied for the exemption, which automatically became effective under the Commission's *Class Exemption* procedures. RLEA then challenged FRVR's use of the exemption by petitioning for revocation of the exemption. Pet. App. 5a-6a.

The ICC denied RLEA's petition. Pet. App. 35a-50a. RLEA contended that Section 10901 was not applicable to the Duck Creek transaction because, in its view, FRVR was formed primarily to avoid the imposition of labor protective provisions under Sections 11343 and 11347 and because FRVR was not sufficiently independent of Itel Rail and its other rail subsidiaries. Pet. App. 41a. Rejecting those contentions, the ICC found that FRVR operated independently of its parent and affiliated carriers and that it had not been created for the sole purpose of avoiding the labor protective provisions; FRVR's acquisition of the line was, therefore, properly considered under Section 10901. Pet. App. 6a, 45a-48a.

3. a. Buffalo & Pittsburgh Railroad (B&P) was formed to acquire and operate 369 miles of a marginal CSX Transportation, Inc. (CSXT) rail line. B&P's stock is equally divided between Genesee & Wyoming Industries, Inc. (GWI) [2] and the Arthur T. Walker Estate Corporation (Walker).[3] Each made capital contributions of $2 million to B&P in return for all of its common stock. B&P purchased the CSXT line for $28.5 million. First National Bank of Boston provided most of B&P's financing for this acquisition. Although GWI and Walker pledged their

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[2] GWI, a holding company, controls, among other railroads, the Genesee & Wyoming Railroad Co. and the Rochester Southern Railroad, Inc. (RS). The northern end of the line acquired by B&P connects with the RS line. Pet. App. 56a-57a.

[3] Walker is wholly owned by Dumaines, a trust which controls Bangor and Aroostock Railroad Company. Walker owns all the stock of a small railroad, Pittsburgh & Shawmutt Railroad Company (P&S). The southern end of the line acquired by B&P connects with the P&S line. Pet. App. 57a.

B&P stock to the Bank, they did not guarantee any part of the loan to B&P. All the assets of B&P were pledged to the Bank as collateral. Pet. App. 54a, 56a-57a.

b. The ICC granted an exemption from Section 10901 for B&P to acquire and operate the line. Pet. App. 55a. As a result of that acquisition, a joint petition for exemption from Section 11343 was filed so as to authorize GWI, Walker, and Dumaines to continue in control of B&P once it acquired the rail line, and also to authorize the acquisition of control of two other CSXT railroads by B&P, and in turn, by GWI, Walker, and Dumaines. Pet. App. 55a. As required by Section 11347, the ICC imposed labor protective conditions to protect rail employees of the parties to the control transaction who might be adversely affected by it. Labor protective provisions were not imposed in connection with the acquisition transaction. Pet. App. 55a.

c. RLEA requested the ICC to revoke the exemptions for both the control and acquisition transactions, advancing arguments similar to those made in the *FRVR* proceedings. It contended that the Commission should ignore the independent corporate status of B&P and treat the acquisition as one made by its parent-stockholders, with the result that the acquisition would be covered by Section 11343 (and mandatory labor protections), rather than Section 10901 (and discretionary labor protections). It also contended that the labor protective conditions imposed in a control transaction that is connected to an acquisition transaction must be applied to all employees affected by the two transactions, not simply the employees of the carriers that are party to the control proceedings. Pet. App. 62a-70a.

The Commission rejected petitioners' contentions. Citing *Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987), and other cases, the ICC noted that it is not required to ignore the separate corporate forms of the parent and subsidiary, but may probe the individual facts of a case to determine whether sufficient indicia of independence exist to justify treating the subsidiary separately. Applying the factors delinated in prior cases, the ICC concluded that B&P deserved to be considered independently of its parent firms for purposes of invoking Section 10901. Pet. App. 62a-64a. The ICC also found that in light of the joint ownership of B&P by two unaffiliated firms, its separate incorporation fulfilled legitimate business needs and it was not a "sham" transaction to circumvent the requirements of Section 11343. Pet. App. 66a-67a.

In addition, relying on its decision in the *FRVR* proceedings and a consistent line of precedent, the ICC rejected RLEA's claim that labor protections in this control transaction should apply to the seller rail line's employees. It concluded that "the control transaction directly affects only employees of carriers in the commonly controlled system," and that those employees alone are entitled to receive labor protection. "The seller is not a party to the control transaction and its employees are not directly affected by it," unless they become employees of the acquiring carrier. Pet. App. 68a-69a.

4. a. Petitioners filed petitions for review of the ICC's decisions involving the FRVR transactions in the court of appeals. The court denied those petitions. Pet. App. 1a-18a. The court initially held that the ICC had permissibly declined to give labor protection to employees of C&NW in its decision approv-

ing Itel's control over FRVR. Although noting petitioners' argument that the control of FRVR by Itel and the acquisition by FRVR of a line from C&NW were "two necessary and mutually dependent steps in a single transaction," the court found that "the Commission's view that section 11347 does not require labor protection for employees of nonapplicant carriers like C&NW is firmly supported by previous decisions in this and other circuits." Pet. App. 8a-9a. Alternatively, the court concluded that the ICC's interpretation of the statute—that a carrier is "involved in a transaction" under Section 11347 only when it is formally a party to a transaction specifically covered by that provision—is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Pet. App. 10a-11a.

The court also rejected petitioners' contention that FRVR's acquisition of the Duck Creek South line should have been evaluated under Section 11343 rather than Section 10901. Based on a thorough review of the facts, the court concluded that the ICC had properly concluded that FRVR was not the alter ego of Itel as a practical matter, and that FRVR "was organized for substantial business reasons unrelated to the employee protection liabilities that would have been incurred had the purchase been made by an operational rail subsidiary." Pet. App. 11a-17a.

b. RLEA also petitioned for review of the ICC's decisions involving the B&P transactions. Citing its opinion denying the petition for review in the FRVR case, the court of appeals summarily entered judgment denying the petition for review. Pet. App. 52a-53a.

ARGUMENT

1. Petitioners' main contention (Pet. 13-22) is that in each of the ICC's decisions permitting the acquisition of rail lines by noncarriers under Section 10901, the ICC should have treated the noncarrier subsidiaries as the alter egos of their carrier holding company parents. If the ICC had done so, the transactions would have been governed by Section 11343, rather than Section 10901, and labor protections would have been mandatory for all affected employees, including those of the selling railroads under Section 11347. Because the ICC considered the acquisition transactions under Section 10901, labor protections were discretionary.

The court of appeals properly rejected petitioners' claim. Section 10901 has been construed to govern acquisitions of rail lines by noncarriers. See note 1, *supra*. In determining whether Section 10901 applies to the acquisition of a rail line by a noncarrier that is a subsidiary of a carrier holding company, the ICC engages in a fact-sensitive inquiry into (1) whether the subsidiary enjoys sufficient operational and financial independence from the carrier to qualify as a separate entity, and (2) whether it was formed solely to evade the labor protective protections of Section 11347. If a subsidiary qualifies under both prongs of that inquiry, the ICC has concluded that the purposes of Section 10901 are promoted by applying that provision to the acquisition. Pet. App. 45a.

The courts of appeals have uniformly approved the essentials of that analysis. See *Railway Labor Executives' Ass'n* v. *ICC*, 819 F.2d 1172, 1173 (D.C. Cir. 1987) ("Where * * * a subsidiary is financially independent of its parent corporation *and* is not

financially guaranteed by the parent, * * * the ICC is not *compelled* to ignore corporate formalities, but may instead decide each case on its own facts, treating related entities as separate where, in its judgment, the facts demonstrate sufficient indicia of independence."); *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994, 1005-1006 (2d Cir. 1986) (upholding an ICC determination under Section 10901 where the new subsidiary was not formed "to elude the otherwise applicable provisions of section 11343," but for legitimate business purposes, and the subsidiary had "indicia of independence"); *Brotherhood of Locomotive Engineers* v. *ICC*, 909 F.2d 909 (6th Cir. 1990). In reviewing the FRVR acquisition, the court of appeals concluded that that authority "amply support[s] the Commission's analysis of the independence factor," and it rejected, on the particular facts presented, petitioners' contention that "the formalities of corporate structure should have been disregarded because a substantial purpose of FRVR's creation was to evade the imposition of labor protection." Pet. App. 12a, 15a.[4]

Petitioners err in contending (Pet. 12) that the Commission must pierce the corporate veils between parent and subsidiary, and collapse two statutory proceedings into one by regulating the rail line acquisitions in this case under Section 11343. The fact

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[4] Although the court questioned whether the ICC properly articulated the standard governing whether a subsidiary created to evade labor protections should be treated as an alter ego of its parent, the court did not reach that issue because it was satisfied that the ICC had "reasonably concluded that FRVR was organized for substantial business reasons unrelated to employee protection liabilities that would have been incurred had the purchase been made by an operating rail subsidiary." Pet. App. 17a.

that the noncarrier applicant for approval to acquire a rail line is a subsidiary of a carrier or a carrier holding company does not make Section 10901 inapplicable; rather, it simply means that the parent firm must also obtain approval for its continuation in control of the subsidiary under Section 11343 (or an exemption from application of that provision).[5] Because the ICC does apply Section 11343 to the parent's changed relationship with a subsidiary that has become a carrier, petitioners' reliance (Pet. 13-17) on *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 35-36 (1944); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151 (1957); *County of Marin* v. *United States*, 356 U.S. 412 (1958); and *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), is misplaced. Those cases simply establish that parent-subsidiary relations cannot be used to evade ICC regulation of acquisition transactions. Here, there has been no evasion of Section 11343 because the ICC applies that provision to the control relationships created by the acquisitions. None of the cited cases suggests that even if acquisitions are not technically covered by Section 11343, they must nonetheless be treated as if they were in order to insure application

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[5] Section 11343 recognizes the separate corporate existence of parent and subsidiary corporations by referring not only to a "carrier," but also to a "person that is not a carrier but controls any number of carriers." 49 U.S.C. 11343(a)(5). Indeed, the provisions that are now subsections (a)(4) and (a)(5) were added in 1933 precisely because the original 1920 version of the Act, covering only "carriers," did not reach corporate parents, thus allowing holding companies to be used to achieve *de facto* consolidations beyond the reach of ICC regulation. See S. Rep. No. 87, 73d Cong., 1st Sess. 3, 8-9 (1933).

of the labor protective requirements in Section 11347.[6]

In sum, while the ICC is *permitted* in an acquisition transaction to look beyond a noncarrier subsidiary's independent corporate form in order to prevent evasion of the statute's purpose, the ICC is not *required* to do so where a subsidiary was formed for bona fide business reasons and has sufficient indicia of operational and financial independence. Petitioners' claim (Pet. 18-19) that the ICC has incorrectly appraised the relevant considerations to determine whether the particular subsidiaries here were independent simply reflects a disagreement with the agency over the proper interpretation of the facts. The Commission's findings, which were upheld by the court of appeals, warrant no further review by this Court. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[7]

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[6] The historical evolution of the relevant provisions undermines any claim that the ICC's regulatory practice must be modified because of labor protection concerns. Congress fixed the jurisdictional boundaries of Sections 10901 and 11343 in the Transportation Act of 1920, ch. 91, §§ 400, 406, 41 Stat. 474, 481, and the Emergency Transportation Act of 1933, ch. 91, § 201, 48 Stat. 217, for purposes of regulating railroad finances, competition, services, and capacity. It made no significant change in the interplay of those provisions when it passed the Transportation Act of 1940, which added the employee protective provisions now codified in Section 11347. Ch. 722, § 7, 54 Stat. 907. There is no evidence that, in superimposing the employee protective conditions on an established regulatory framework, Congress intended to change the existing scheme solely to make the protective conditions applicable to more transactions.

[7] Petitioners contend (Pet. 26-28) that the ICC has deviated from its interpretation and application of the statute in two recent proceedings—one of which is currently pending before

2. Petitioners also contend (Pet. 22-24) that the ICC has impermissibly determined that in transactions involving the approval of control of one rail carrier by another, labor protections under 49 U.S.C. 11347 are mandated only for the employees of the parties to the transaction that is subject to ICC approval. Section 11347 states that "[w]hen a rail carrier is involved in a transaction for which approval is sought" under certain provisions of the Act, the ICC "shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction" as required under certain former provisions. 49 U.S.C. 11347. The ICC has concluded that the only rail carriers "involved" in a transaction in which a parent will control a subsidiary that has acquired a rail line are the parent and subsidiary companies—not the selling carrier. Pet. App. 24a, 69a. The ICC has "consistently rejected the argument that employee protection should be extended to employees of carriers not party to the section 11343 transaction which gave rise to mandatory protection." *Id.* at 69a, citing *Milwaukee Reorganization—Acq. by GTC*, 2 I.C.C.2d 161, 221 (1984); *Guilford Transp. Indus., Inc.—Control—B&M Corp.*, 366 I.C.C. 292, 344 (1982); and *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 948-950 (1980).

As the court of appeals explained, Pet. App. 9a, the ICC's interpretation has been upheld by the courts of appeals in a long line of decisions. See *Lamoille*

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the ICC. Quite apart from our disagreement with the suggestion of inconsistency, the court of appeals correctly found it irrelevant to the present case which was decided "before the ones cited by petitioners." Pet. App. 14a. There will be time enough to consider whether the agency policy articulated in those later decisions warrants this Court's review.

Valley R.R. v. *ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983); *Southern P. Transp. Co.* v. *ICC*, 736 F.2d 708, 725 (D.C. Cir. 1984); *Missouri-K.-T. R.R.* v. *United States*, 632 F.2d 392, 410-412 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); *Crounse Corp.* v. *ICC*, 781 F.2d 1176, 1192-1193 (6th Cir.), cert. denied, 479 U.S. 890 (1986).[8] The statutory language requires that labor protections be applied to affected employees of carriers "involved" in the transaction subject to approval by the ICC; the natural reading of that provision is that the "involved" carriers are those that are party to the transaction that the ICC must review. But even if the provision were ambiguous, the ICC's interpretation is entitled to deference if it is rational and consistent with the statute. *Chevron*, 467 U.S. at 843-845; *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990). The court of appeals correctly concluded that the ICC's consistent interpretation of the Act, which promotes its efficient administration and is supported by the relevant legislative history, satisfies that standard. Pet. App. 10a; see *Lamoille Valley*, 711 F.2d at 323-324.[9]

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[8] Petitioners' contention (Pet. 22 & n.7) that these cases are inapposite because each dealt with employees of competing carriers is wide of the mark. The ICC's construction of the language of Section 11347 to cover only those carriers that are parties to the transaction being reviewed applies equally to competitor carriers and to selling carriers.

[9] Congress amended former Section 5(2)(f) of the Act in 1976 and then recodified that provision as Section 11347 in 1978 without any change with respect to the employees covered. As the court noted in *Lamoille Valley*, Congress "implicitly approved the ICC's interpretation in revising and reenacting Section 11347 in 1976." *Lamoille Valley*, 711 F.2d at 324, citing *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (additional deference to an agency's statutory inter-

Petitioners argue (Pet. 23-24) that the ICC's interpretation of Section 11347 is invalid because that provision is simply a recodification of former Section 5(2)(f), which referred to the employees of the "carrier or carriers" involved in a regulated transaction as being eligible for protective conditions. Consequently, petitioners contend, the singular form used in Section 11347 ("a rail carrier * * * involved in a transaction") does not support the ICC's exclusion of a selling carrier's employees. Petitioners' contention is wrong. The ICC has never stated that only one carrier's employees are eligible for labor protective conditions; the ICC's view is that only affected employees of an applicant carrier are eligible for labor protection. The language of Section 11347's predecessor is consistent with that reading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

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pretation is due "where Congress has reenacted the statute without pertinent change").

* The Solicitor General is disqualified in this case.

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No. 90-1127

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, FOX RIVER VALLEY RAILROAD CORPORATION, ITEL CORPORATION, ITEL RAIL CORPORATION, CSX TRANSPORTATION, INC., AND BUFFALO & PITTSBURGH RAILROAD, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court below correctly upheld the decisions of the Interstate Commerce Commission allowing newly formed noncarrier companies to acquire railroad lines under the agency's class exemption applicable to railroad line acquisitions, pursuant to 49 U.S.C. 10901, upon the ICC's finding, based upon the evidence of record, that, notwithstanding affiliation of the companies with railroad holding companies, they were financially and operationally independent of them.

2. Whether the court below correctly upheld the decisions of the Interstate Commerce Commission in which it concluded that the sellers of the railroad lines were not involved in the transactions by which the control relationships between the companies that had acquired the railroad lines and their corporate parents were approved, pursuant to an exemption from the requirements of 49 U.S.C. 11343, and that the sellers' employees were unaffected by the authorized control transactions.

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IN THE

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
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BRIEF OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, FOX RIVER VALLEY RAILROAD CORPORATION, ITEL CORPORATION, ITEL RAIL CORPORATION, CSX TRANSPORTATION, INC., AND BUFFALO & PITTSBURGH RAILROAD, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The private respondents, Chicago and North Western Transportation Company, Fox River Valley Railroad Corporation, Itel Corporation and Itel Rail Corporation, intervenors in Nos. 88-1793 and 89-1183 before the court below, and CSX Transportation, Inc., and Buffalo & Pittsburgh Railroad, Inc., intervenors in No. 89-1436 before the court below, pursuant to

Rule 15 of the Rules of this Court, submit this brief in opposition to the petition for a writ of certiorari herein.

STATEMENT OF THE CASE

The Fox River Valley line

Chicago and North Western Transportation Company ("CNW"),[1] as part of its continuing effort to dispose of marginally profitable railroad lines,[2] proposed to sell 208 miles of railroad line between Green Bay and Milwaukee, Wisconsin, in the Fox River Valley. Fox River Valley Railroad Corporation (formerly FRVR Corporation and hereafter referred to as "FRVR"),[3] a newly organized corporation, which at the time was neither a railroad nor a person in control of a railroad, agreed to purchase the properties for some $61 million.

Availing itself of the class exemption previously promulgated by the Interstate Commerce Commission ("ICC"),[4] FRVR, joined by CNW, filed a Notice of Exemption to acquire the CNW line, effective De-

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[1] CNW's parent and nonwholly owned subsidiaries are identified in Appendix A to this brief.

[2] *See generally, Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co*, 467 U.S. 622 (1984); *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile*, 450 U.S. 311 (1981).

[3] FRVR is a wholly-owned subsidiary of Itel Rail Corporation ("Itel Rail"), which, in turn, is controlled by Itel Corporation ("Itel"). Itel Rail controls, among other companies, the Green Bay and Western Railroad Company and three other short-line railroads. *See* Appendix A to this brief.

[4] *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *review denied, Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (list).

cember 30, 1987.[5] The ICC, as in other acquisition exemption proceedings, did not attach employee protective conditions, but invited the Railway Labor Executives' Association ("RLEA") to introduce evidence as to why employee protective conditions would be warranted.[6] RLEA did not respond but, rather, sought the revocation of the exemption, alleging, among other things, that FRVR was nothing more than the alter ego of its parent and that, therefore, the purchase of CNW properties was subject to 49 U.S.C. 11343(a) and the mandatory imposition of employee protective conditions, as provided in 49 U.S.C. 11347.

The Commission disagreed, and the court below sustained its determination. The Commission, based on the evidence of record before it, found that FRVR had been established for legitimate business reasons, including its assumption of the risks associated with operation of facilities that had proven unprofitable for CNW (App. 11a, 46a-47a), and that, while Itel Rail had contributed $14 million of equity to FRVR and Itel and Itel Rail had guaranteed a loan necessary to consummate the acquisition, FRVR otherwise was financially and operationally independent of its corpo-

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[5] Finance Docket No. 31205, *FRVR Corporation—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Company* (unreported), served January 11, 1988, 53 *Fed. Reg.* 647. CNW successfully brought an action to bar its employees from striking to block consummation of the sale. *Chicago and North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988).

[6] Unreported decision, served January 29, 1988, *set aside on other grounds, Railway Labor Executives' Ass'n v. ICC*, 861 F.2d 1083, (8th Cir. 1988), *aff'd*, 888 F.2d 1227 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1808 (1990).

rate affiliates (App. 11a, 48a). The evidence, the ICC found, did not compromise FRVR's separate identity or detract from the independence of its operations. Accordingly, FRVR's purchase of CNW's railroad line was properly processed under the ICC's acquisition exemption procedures (App. 12a, 49a). The court below, at App. 18a, said, "In the instant case . . . we . . . conclude that, as FRVR met the test of independence and was formed for reasons that are both legitimate and substantial, the ICC could reasonably determine that it was a non-carrier for purposes of section 10901."

Since FRVR by its purchase of CNW's railroad line would itself become a railroad, Itel and Itel Rail sought and secured ICC approval of their control of FRVR, subject to section 11347 employee protective conditions.[7] RLEA sought clarification or reconsideration of the ICC's decision, contending that under the statute, the protection ordered by the ICC as a condition to its approval of the control transaction must be extended to any CNW employees affected by CNW's sale of its railroad line to FRVR, notwithstanding that CNW was not a party to the control transaction.

Again, the ICC disagreed with the RLEA's contention, and the court below affirmed its holding. The fact that CNW was the seller of the railroad line, the ICC found, did not make it a party to the transaction in which the control relationship between FRVR and its corporate parents was approved; CNW's employ-

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[7] Finance Docket No. 31206, *Itel Rail Corp. and Itel Corp.—Cont. in Control Exempt.—FRVR Corp.* (unreported), served February 5, 1988.

ees were unaffected by the section 11343 transaction (App. 9a-10a, 23a-24a). The ICC noted that it uniformly has held that mandatory employee protective conditions extend only to employees of the applicant railroads and that the United States courts of appeals consistently have sustained its construction of the statute; nothing of record compelled a contrary result (*id.*).

The B&P line

CSX Transportation, Inc. ("CSXT"),[8] offered to sell its marginally profitable 369-mile line between Buffalo, New York, and Eidenau, Pennsylvania, to the Buffalo & Pittsburgh Railroad, Inc. ("B&P"),[9] a newly organized corporation, jointly controlled by two unrelated entities, Genesee & Wyoming Industries, Inc.,[10] and the Arthur T. Walker Estate Corporation.[11] B&P proposed to finance the railroad line's $28.5 million purchase price with the proceeds of a bank loan secured by the assets being purchased. To help secure the bank loan, B&P's two corporate parents agreed to pledge their B&P stock to the bank in the event B&P defaulted on its loan obligations. B&P's initial capitalization consisted of an aggregate $4 million capital contribution from its parents in return for their B&P stock (App. 56a-57a).

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[8] CSXT's parent and nonwholly owned subsidiaries are identified in Appendix A to this Brief.

[9] B&P controls the Allegheny and Western Railway Company and the Clearfield and Mahoning Railroad Company.

[10] Genesee & Wyoming Industries, Inc., has several wholly-owned short-line railroad subsidiaries.

[11] The Arthur T. Walker Estate Corporation, which controls a railroad, is controlled by Dumaines, a New Hampshire trust, which also controls a railroad.

B&P filed a Notice of Exemption under the same section 10901 class exemption invoked by FRVR in its purchase of the CNW's railroad line. Consistent with the ICC's practice, the exemption became effective without protective conditions being imposed for the employees of either the B&P or CSXT (App. 54a-55a).

B&P's parents, which following the B&P's railroad line acquisition would be in control of an additional carrier, petitioned the ICC for an exemption from the requirements of 49 U.S.C. 11343. CSXT took no part in that proceeding. The ICC granted the exemption petition and, as required by 49 U.S.C. 11347, imposed employee protective conditions, limited, however, to the employees of B&P and its parents but not to those of CSXT (App. 68a-70a).

RLEA and the United Transportation Union ("UTU") sought revocation of the exemption in both the proceeding allowing B&P's acquisition of CSXT's railroad line and the proceeding approving the control relationship between B&P and its two corporate parents. With respect to the former, RLEA and UTU argued that the acquisition should have been governed by section 11343, principally because B&P would connect with short-line railroads already controlled by its parents and, furthermore, because its parents had guaranteed B&P's financial obligations (App. 63a-64a). The ICC disagreed, finding that its parents had not guaranteed B&P's financial and contractual obligations and that there were sufficient other indicia of B&P's independence to justify treating the acquisition under the section 10901 class exemption procedure (App. 65a-66a). As for the proceeding approving the control relationships between the B&P and its par-

ents, RLEA and UTU argued that, because the sale by CSXT of its railroad line to the B&P made the transaction necessary, CSXT was "involved" in the proceeding, and CSXT's employees, therefore, were entitled to the protective conditions attached to the ICC's approval of the transaction (App. 68a). The ICC rejected the argument in favor of its long standing and judicially approved construction of section 11347 as requiring the imposition of protective conditions only for the employees of the railroads which were the applicants in the control proceeding (App. 68a-70a).

RLEA petitioned the court below for review of the ICC's decision, advancing essentially the same arguments it had in the case involving the Fox River Valley line. The court below summarily denied the petition in light of its decision in that case (App. 52a-53a).

SUMMARY OF ARGUMENT

This case does not warrant the granting of the petition for a writ of certiorari. The decisions of the court below are in total accord with those of the several United States courts of appeals that have addressed either of the two matters in issue. The courts uniformly have been in agreement that a newly organized company, as FRVR and B&P were, can avail itself of the section 10901 class exemption procedures when purchasing a railroad line, notwithstanding that the acquiring company may be an affiliate of a railroad holding company. The courts have been in agreement, as well, that section 11347 protective conditions are mandated only for the affected employees of the railroads that are participants in a section 11343

transaction. Indeed, the petitioners do not even allege a conflict with the decisions of other United States courts of appeals.

The petitioners' claim that the decisions of the court below conflict with applicable decisions of this Court is palpably contrived; it fails to withstand rudimentary analysis. None of the decisions relied on by the petitioners dealt with the issue whether a noncarrier affiliate of a railroad holding company can acquire a railroad line pursuant to section 10901, rather than section 11343, and none dealt with the need for imposing section 11347 employee protective conditions in transactions subject to the ICC's approval under section 11343. At best, the decisions relied upon by the petitioners underscore the breadth of the ICC's jurisdiction to oversee carrier mergers and acquisitions, a matter as to which the decisions below pose no challenge.

The ICC reasonably applied the statutory provisions to facts supported by substantial evidence. The court below correctly accorded such decisions the deference they were due.

ARGUMENT

I.

The courts are in agreement that a noncarrier's acquisition of a railroad line is subject to approval under section 10901, rather than section 11343.

The Railroad Revitalization and Regulatory Reform Act of 1976,[12] precursor of the Staggers Rail Act of

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[12] Public Law 94-210, 90 Stat. 31, *et seq.*

1980,[13] marked a dramatic change in the regulation of the Nation's railroads. Concerned that the rigidities of the time honored regulatory structure hampered the railroads in adjusting to the Nation's changing traffic patterns and responding to the increased competition of the other modes of transportation, the Congress greatly relaxed the regulatory restraints upon the railroads and allowed them considerable leeway to effect mergers and acquisitions, set rates and charges, and implement discontinuances and abandonments.

Discontinuances of service and abandonments of railroad lines continue to require ICC approvals, pursuant to 49 U.S.C. 10903, but such approvals are more readily and speedily attainable than before the statute's amendment. Newly added provisions, 49 U.S.C. 10905, were designed to facilitate the purchase by successor operators of railroad lines that otherwise would be lost to abandonments.

An alternative to the abandonment process is the direct sale of a railroad line to a successor operator. If, as occasionally has occurred, the purchaser of the railroad line is another railroad, the transaction requires the ICC's approval under 49 U.S.C. 11343. If, however, as more frequently has been the case, the acquirer of the railroad line is neither a carrier nor a person in control of a carrier, the purchase is subject to the ICC's approval pursuant to 49 U.S.C. 10901. As the court explained in *Matter of Chicago, M. St. P. & Pac. R. Co.*, 658 F.2d 1149, 1169 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982):

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[13] Public Law 96-448; 94 Stat. 1895, *et seq.*

> Under the Interstate Commerce Act . . ., a distinction is made between non-carrier acquisitions and other purchase transactions which involve two or more existing rail carriers. Such non-carrier acquisitions and the operating authority which follows and which results from abandonment or other line extension is now governed by 49 U.S.C. §§ 10901 and 10903, formerly Section 1(18)-1(20), 49 U.S.C. §§ 1(18)-1(20) (repealed 1978). Transactions involving transfers or sales between two or more existing carriers, normally termed unifications, are governed by 49 U.S.C. § 11343, formerly Section 5(2), 49 U.S.C. § 5(2) (repealed 1978) [footnotes and citations omitted].

It bears noting that the acquisitions under consideration in that case included purchases by two newly formed companies, affiliates of railroad holding companies, that were approved pursuant to section 10901, while the control relationships between them and their parent companies were separately reviewed by the ICC under section 11343.[14]

In the intervening decade this has been a major means by which successor operators have obtained railroad lines that were only marginally profitable for the railroads that had operated them, namely, the purchaser would acquire the railroad line pursuant to 49 U.S.C. 10901, with an application also being filed

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[14] Finance Docket No. 29431, *Potlatch Corporation—Control—St. Maries River R. Co.* (unreported), served April 15, 1981; Finance Docket No. 29198, *Kyle Railways, Inc., et al.—Control—Pend Oreille Valley R. Co.* (unreported), served March 4, 1981.

under 49 U.S.C. 11343 if the purchaser was affiliated with a carrier or person in control of a carrier.[15] Indeed, after reviewing numerous transactions of this kind, in 1985 the ICC in *Class Exemption—Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, supra*, promulgated a class exemption for such section 10901 transactions, pursuant to the provisions of 49 U.S.C. 10505.

Petitioners do not challenge the validity of the section 10901 class exemption procedure. Rather, they maintain that it simply does not apply if the noncarrier purchaser is an affiliate of a railroad holding company; in such a situation, they contend, the acquisition must be considered by the ICC pursuant to 49 U.S.C. 11343 (petition, pp. 12 & 19). Their approach is too simplistic and ignores altogether the ICC's determination upon the evidence of record as to whether the purchaser is in fact an entity separate and distinct from the holding company and, hence, itself not a carrier or person in control of a carrier. Here, of course, the ICC concluded that FRVR and B&P were financially and operationally independent of their affiliates and, therefore, entitled to avail themselves of the section 10901 class exemption procedure (App. 16a, 48a, 65a-66a).[16]

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[15] *Railway Labor Executives' Ass'n v. United States*, 811 F.2d 1327, 1329 (9th Cir. 1987); *Black v. ICC*, 762 F.2d 106, 114 (D.C. Cir. 1985).

[16] The petitioners, at page 18 of their Petition, invite this Court to reweigh the evidence before the agency, a role which it heretofore has declined to assume. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87 (1934).

In reaching its conclusions, the ICC applied the indicia of independence formulated in Finance Docket No. 30779, *Rochester & S.R., Inc. and Genesee and W. Indust., Inc.—Exemp. from 49 U.S.C. 10901, 11301, and 11343* (unreported), served July 13, 1986, *aff'd, Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1173 (D.C. Cir. 1987), and Finance Docket No. 30629, *Staten Is. R. Corp.—Exempt. for 49 U.S.C. 10901; Delaware Otsego Corp. and Staten Is. R. Corp.—Exemp. from 49 U.S.C. 11301* (unreported), served July 18, 1986, *aff'd, Railway Labor Executives' Ass'n v. U.S.* 791 F.2d 994 (2d Cir. 1986). Both cases involved an acquisition of a rail line by a newly created noncarrier affiliate of a railroad holding company, and in both cases the subsidiary received financial assistance from its corporate parent but not to such an extent as to compromise its separate identity and operation. In both cases the reviewing courts upheld the ICC's determinations that the evidence did not require the noncarrier status of the acquiring companies to be disregarded and the purchases to be approved under section 11343, rather than section 10901.

Only recently a third United States court of appeals, in *Brotherhood of Locomotive Engineers v. I.C.C.*, 909 F.2d 909 (6th Cir. 1990), *aff'ing*, Finance Docket No.31187, *SouthEastern Rail Corporation—Acquisition and Operation Exemption—Gulf and Mississippi Railroad* (unreported), served August 31, 1989, came to a similar conclusion. The court, at 914, said:

> We conclude that the ICC properly looked past the corporate shells to the underlying relationships between the companies involved in this transaction and properly determined that MidSouth formed SouthRail for the le-

> gitimate business purpose of acquiring and operating GMR as an independent subsidiary. We further conclude that the ICC properly determined that SouthRail was entitled to invoke a section 10901 class exemption for its acquisition of GMR.

Significantly, in challenging the validity of the lower court's decisions, the petitioners do not discuss, much less distinguish, the foregoing United States courts of appeals decisions upholding the ICC's determinations, similar to the one made herein, that a newly formed noncarrier company may acquire a railroad line under the agency's section 10901 class exemption procedure, notwithstanding that the company was an affiliate of a railroad holding company. Indeed, each of the United States courts of appeals which has been confronted with the issue has agreed with the ICC that a noncarrier's acquisition of a railroad line is appropriate for disposition under section 10901, rather than section 11343, even when the noncarrier is an affiliate of a railroad holding company.

Petitioners instead purport to rely upon four decisions of this Court.[17] None is relevant, much less on point, and the petitioners' assertion, at page 18 of their petition, of a "direct conflict" between the decisions below and the decisions of this Court which they cite is plainly wrong. The issue whether a noncarrier affiliated with a carrier can acquire a railroad line under section 10901, rather than section 11343,

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[17] *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962); *County of Marin v. United States*, 356 U.S. 412 (1958); *Alleghany Corporation v. Breswick & Co.*, 353 U.S. 151 (1957); *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944).

arose in none of them; nor, for that matter, did the issue whether protective conditions must be provided only for the affected employees of the railroads which are party to a section 11343 transaction. The best that can be said of the decisions is that they underscore the breadth of the ICC's jurisdiction, based on the evidence of record before it, to oversee carrier mergers and acquisitions, a matter as to which the decisions below pose no challenge.[18] Here, the ICC, upon consideration of the facts presented and consistent with its practice, deemed the railroad line acquisitions appropriate for its disposition under section 10901, or, alternatively, the class exemption procedure relating thereto, rather than, as petitioners urged, section 11343. That agency choice, based on the evidence before it, scarcely rises to an abuse of the statutory scheme, as petitioners contend.[19]

Petitioners, also, refer to two recent decisions in which the ICC allegedly reached results contrary to

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[18] The cases cited by the petitioners were so unpersuasive to the court below that they were not even discussed in its decisions. The Sixth Circuit, which did address these cases, found them unavailing: "Any relevance that *Marshall* and *Alleghany* have to this issue lies in their holdings that require the ICC to review each proposed transaction on a case-by-case basis to evaluate the nature of the relationships between the parties." *Brotherhood of Locomotive Engineers v. I.C.C.*, *supra*, 909 F.2d at 913.

[19] Indeed, the showing of public convenience and necessity, under 49 U.S.C. 10901, imposes a more rigorous burden of proof upon the applicant than a mere demonstration of no anticompetitive consequences resulting from the proposed transaction, under 49 U.S.C. 11344(d).

those reached herein.[20] In both decisions, however, the ICC specifically held that the companies acquiring the railroad lines, although newly formed, were not to be operated independently but, to the contrary, were to be totally integrated into the operations of their affiliates. The ICC, therefore, concluded that the transactions properly were subject to its approval under section 11343, as the applicants themselves had urged in submitting their transactions for the agency's authorization. In any event, as a reviewing court, the court below did not need to concern itself with the consistency or inconsistency of the ICC's decisions, so long as the ones before it were properly decided.[21]

II.

The courts are in agreement that protective conditions must be afforded only the affected employees of the applicant railroads.

RLEA, although invited by the ICC to do so, elected not to introduce evidence in the reopened section 10901 exemption proceeding as to why, contrary to its usual procedure, the ICC should have provided protective conditions for the employees of the CNW

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[20] Finance Docket No. 31505, *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line Between Kansas City, Mo. and Chicago, Ill.* (unreported), served November 15, 1989; *Rio Grande Indus., Inc.—Purchase and Trackage Rights—Chicago, Missouri & Western Ry. Co.*, 5 I.C.C. 2d 952 (1989). Petitioners, finally, refer to Finance Docket No. 31617, *Chesapeake and Albemarle R. R., Inc.—Lease Acquisition and Operation Exemption—Southern Ry.*, a proceeding which evidently remains pending before the ICC and is yet to be decided by it.

[21] *Virginian Ry. Co. v. United States*, 272 U.S. 658, 665-66 (1926).

affected by the sale of its railroad line to FRVR (*see* App. 44a-45a). Rather, it awaited the ICC's section 11343 approval of the control relationship between FRVR and Itel and Itel Rail to maintain that the CNW's employees should have been included.[22]

Petitioners' argument that a nonparticipant's employees are entitled to protection under section 11347 comes too late. Every United States court of appeals that has considered the issue has upheld the Commission in its construction of section 11347 as requiring protective conditions only for the affected employees of the railroads which were parties to the section 11343 transactions. *Railway Labor Executives' Association v. ICC*, 869 F.2d 1492 (6th Cir. 1989) (list), *aff'ing*, No. 31186, *MidSouth Corp.—Continuance in Control Exemption—South Eastern Rail Corp.* (unreported), served February 12, 1988; *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1192 (6th Cir. 1986), *aff'ing*, *CSX Corp.—Control—American Commercial Lines, Inc.*, 2 I.C.C. 2d 490, 557 (1984); *Cosby v. I.C.C.*, 741 F.2d 1077, 1079 (8th Cir. 1984), *rev'ing on other grounds*, *Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 788, 948 (1980); *Southern Pacific Transp. Co. v. I.C.C.*, 736 F.2d 708, 725 (D.C. Cir. 1984), *aff'ing*, *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 462, 621 (1982); *Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295, 323-24 (D.C. Cir. 1983), *aff'ing*, *Guilford Transp. Industries, Inc.—Control—B&M Corp.*, 366 I.C.C. 294, 344

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[22] In the section 10901 class exemption proceeding involving the B&P's purchase of the CSXT's railroad line, RLEA sought to show why employee protective conditions should be imposed. The ICC, however, deemed such conditions not warranted (App. 70a-74a), a finding unassailed by the petition herein.

(1982); *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 411 (5th Cir. 1980), *aff'ing, Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 788, 948 (1980).

The ICC's construction of the statute as not requiring the extension of protective conditions to employees of railroads not party to the section 11343 transaction long antedated the 1978 recodification,[23] and, therefore, the change from the plural to the singular in the wording of section 11347 to which the petitioners point, at page 23 of their petition, effected no substantive change in the law.

In the proceedings in question CNW and CSX were the sellers of the railroad lines, rather than competitors of the parties to the section 11343 transactions; however, that is a distinction without a difference. As the court below concluded, "None of this [foregoing] reasoning distinguishes employees of competitors from those of non-applicants generally; all of it supports the Commission's contention that CNW's employees are not entitled to the protections of section 11347 for the compelling reason that CNW was not a party to the control proceeding" (App. 10a).

CONCLUSION

In the final analysis, these cases come down to whether the ICC reasonably read the provisions of 49 U.S.C. 10901, 11343 and 11347, entrusted to the agency for their administration. That it did so is manifest; its construction of the statute has been upheld

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[23] *See, Southern Ry Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 567 (1962); *Baltimore & O.R. Co. Operation*, 261 I.C.C. 615, 619 (1946).

by each of the United States courts of appeals which heretofore has considered its text. The court below correctly accorded the ICC's decisions the deference they were due. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840-42 (1984).

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 15, 1991

APPENDIX

APPENDIX A

Chicago and North Western Transportation Company ("CNW") is a wholly-owned subsidiary of CNW Corporation, which is wholly-owned by Chicago & North Western Acquisition Corporation, which is wholly-owned by Chicago & North Western Holdings Corporation, the majority interest of which is held by Blackstone Capital Partners, L.P., an affiliate of the Blackstone Group. Union Pacific Corporation holds one hundred percent (100%) of the non-voting preferred stock of Chicago & North Western Holdings Corporation.

The subsidiaries of CNW, other than those wholly-owned by it are:

Iowa Transfer Railway Company
Kansas City Terminal Company
MT Properties, Inc.
Peoria & Pekin Union Trailway Company
Trailer Train Company
Transportation Data Exchange, Inc.
ACE Limited
Railroad Association Insurance, Ltd.
Transportation & Railroad Assurance Company, Ltd.
Transportation Quality Systems, Inc.
CNW Realco, Inc.

Fox River Valley Railroad Corporation (formerly FRVR Corporation) is a wholly-owned subsidiary of Itel Rail Corporation (except for one-tenth of one percent of the shares owned by directors of FRVR), which itself is a wholly-owned subsidiary of Itel Corporation, a publicly-held company.

The direct and indirect subsidiaries of Itel Corporation, other than those directly or indirectly wholly-owned by it are:

DCN Acquisition Corporation
Green Bay and Western Railroad Company

McCloud River Railroad Company
North American Trailing Company
The Ahnapee and Western Railway Company
Impac of New Jersey, Inc.
Interstate Bi-Modal, Inc.

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries of CSXT, other than those wholly-owned by it, are:

The Akron & Barberton Belt Railroad Company
The Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
The Baltimore and Cumberland Valley Railroad Extension Company
Beaver Street Tower Company
Belt Railway Company of Chicago
The Central Railroad Company of South Carolina
Central Transfer Railway and Storage Company
Chatham Terminal Company
Clearfield and Mahoning Railway Company
Chicago and Western Indiana Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Delaware and Bound Brook Railroad Company
The Home Avenue Railroad Company
The Lakefront Dock and Railroad Terminal Company
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company, which has a subsidiary, RF&P Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company
Woodstock & Blockton Railway Company

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No. 90-1127

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The briefs of the "Federal Respondents" [1] and the "Private Respondents" [2] in opposition to the petition of "Rail Labor" [3] for review of the decisions of the United States Court of Appeals for the District of Columbia Circuit in *Railway Labor Executives' Ass'n v. ICC*, 914 F.2d 276 (D.C. Cir. 1990) and *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. No. 89-1436 (October 30,

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[1] The United States of America and the Interstate Commerce Commission ("ICC" or "Commission").

[2] The Chicago and North Western Transportation Co. ("CNW"), Fox River Valley Corporation ("FRVR"), Itel Corporation ("ITEL"), Itel Rail Corporation ("Itel Rail"), CSX Transportation Inc. ("CSXT"), and Buffalo & Pittsburgh Railroad, Inc. ("B&P").

[3] The Railway Labor Executives' Association ("RLEA") and the United Transportation Union ("UTU").

1990) have misunderstood the holdings and the import of the decisions of this Court which were relied upon by Rail Labor and with which the decisions below conflict. Accordingly, this reply brief is respectfully submitted pursuant to Rule 15.6 of the Rules of this Court.

RESPONDENTS' ARGUMENTS AGAINST THE PETITION IGNORE THE BROAD HOLDINGS OF SEVERAL PRIOR DECISIONS OF THIS COURT WITH WHICH THE DECISIONS BELOW CONFLICT

This petition concerns two transactions that exemplify a recent practice in the railroad industry by which corporations that own or control rail carriers acquire additional rail lines that connect with existing subsidiary railroads to create interlocking rail systems, without ICC approval of the acquisitions under Sections 11343 and 11344 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343 and 11344. These provisions govern sales of rail lines by carriers to other carriers or to corporations which control carriers, and such sales cannot be effected without provision of employee protective arrangements under 49 U.S.C. § 11347. Corporate rail systems have evaded the requirements of those provisions by forming new subsidiaries to effect the acquisitions under 49 U.S.C. § 10901, which has been held to govern acquisitions of rail lines by non-carriers and has no mandatory employee protection obligation. While the parent corporations have sought approval under Sections 11343 and 11344 of their continued control over the subsidiaries that acquired the additional rail lines (or exemption from such approval), the scope of those proceedings, as well as the scope of employee protections attached thereto, have been limited by the filing for authorization or exemption of the control relationships under separate "Finance Dockets" from the acquisitions, creating separate proceedings concerned only with the common control of multiple carriers.

The net result of this maneuvering was to avoid Commission scrutiny of the *acquisitions* under Sections 11343

and 11344 and to deny employee protective benefits to individuals who worked on the acquired lines which would have been mandatory had the acquisitions been effected under Sections 11343 and 11344. Rail Labor has challenged the Commission's sanctioning of this evasion of Sections 11343 and 11344 as in direct conflict with decisions of this Court that regulation under those provisions cannot be limited or determined through the use of subsidiaries and other corporate devices, or by the form in which transactions are presented to the Commission. *See United States v. Marshall Transport Co.*, 322 U.S. 31 (1949); *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 156 (1957); *County of Marin v. United States*, 356 U.S. 412 (1958); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

Respondents dispute any conflict between the court of appeals' decisions and this Court's decisions asserting that, in the instant cases, there was no evasion of ICC regulation of an acquisition under Section 11343, because the ICC applies that provision to the control relationships created by the acquisitions, that none of the decisions cited by petitioners involved employee protection conditions and that none of them involved the issue of whether a carrier can acquire a rail line under Section 10901 rather than under Section 11343. Brief for Federal Respondents at 11-12, Brief for Private Respondents at 13-14. Respondents also assert that the D.C. Circuit's decisions are consistent with decisions of other circuits which affirmed the ICC's view that the acquisition of a rail line by a subsidiary or affiliate of a carrier is a non-carrier acquisition, even if the new line connects with a line owned by an affiliate, so long as the new subsidiary satisfies an ICC test of certain minimal indicia of independence, as well as decisions which held that Section 11347 obligations were limited to carriers actually participating in the transaction in which they were imposed. Brief for Federal Respondents at 13-14, Brief for Private Respondents at 17.

1. Respondents have not refuted Rail Labor's showing that the court of appeals' decisions conflict with the *Marshall Transport* line of cases. Contrary to Respondents' assertions, the applicability of those decisions to the instant cases is not diminished because none of those cases involved employee protection or questioned whether an acquisition was properly considered under Section 11343 (then Section 5) or Section 10901 (then Section 1(18)). Respondents' narrow reading of those decisions simply ignores the Court's analysis of the language of the ICA and its history, which were the bases for its holdings; this Court spoke broadly and forcefully concerning the general interpretation and application of then Section 5, holding that carriers and corporations which controlled carriers could not evade regulation under Section 5, or dictate the results of regulation under Section 5 through the use of subsidiaries and holding companies.

In *Marshall Transport*, the determination that a parent corporation was required to obtain Commission approval of its acquisition of a carrier through a subsidiary was based upon the principle that application of Section 5 must depend upon the actual nature and practical effects of a transaction. Accordingly, despite the subsidiary's application for authorization of the acquisition, the parent was required to obtain such authorization because the effect of the transaction was that the parent had acquired control over another carrier. 322 U.S. at 32, 35-37, 41-42. In *County of Marin*, the Court held that the ICC lacked jurisdiction over a transfer of operating rights between a parent and a subsidiary formed for the purpose of effecting the transfer because, in actuality, the transaction was a transfer of operating rights by a corporation to a wholly-owned "corporate shell" in an essentially "paper transaction" for the purpose of invoking ICC Section 5 jurisdiction to avoid state regulation. 336 U.S. 418-419. That holding was based upon the principle that Commission processes may not be manipulated through corporate devices, but rather must be guided

by the actual nature and practical effects of transactions within its jurisdiction. *Id.*

This analysis of the proper functioning of Section 5 was forcefully reiterated in *Gilbertville Trucking Co.*, in which this Court explained that an expansive reading of Section 5 was required by the language of that provision, and especially by the history of successive amendments to Section 5, specifically to prevent evasion of Section 5 through artificial structuring of transactions through elaborate corporate devices used to obtain control over railroads without Commission supervision through the use of "the holding company system." 371 U.S. at 124-25. Accordingly, contrary to the assertions of respondents, the *Marshall Transport* line of cases may not be limited to their specific facts, nor do those decisions merely recognize broad Commission discretion with respect to enforcement of Sections 11343 and 11344. The Court established fundamental principles which govern Commission consideration of all transactions involving acquisitions of rail lines and held that the Commission must aggressively scrutinize transactions within its jurisdiction to insure that those provisions are properly applied and enforced.[4]

2. Rail Labor submits that the decisions below conflict with *Marshall Transport* and its progeny because the Commission ignored the realities of the corporate relationships and the practical effects of these transactions.

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[4] Contrary to the implication in the Brief of the Federal Respondents (at 9-10) and the Brief of the Private Respondents (at 3), this does not mean that enforcement of Sections 11343 and 11344 in such cases depends upon findings that subsidiaries are *alter egos* of their parents or affiliates, or that the ICC "must pierce the corporate veils between parent and subsidiary," as those terms are used in corporate law. As is set forth in Rail Labor's petition (at 19-20 n.5), enforcement of federal law can require that corporate formalities be ignored even if they are valid under state law, and the actions of a federal agency to enforce federal law neither render a corporation illegitimate nor undermine its separate status under state law.

These transactions allowed corporations that control rail carriers to acquire additional rail lines which connect with existing subsidiaries without Commission authorization or exemption of the acquisitions under Sections 11343 and 11344, and without provision of statutorily mandated employee protective arrangements for the employees affected by the acquisitions: the employees who worked on the lines which were acquired.

The Federal Respondents' brief actually demonstrates the conflict between the decisions below and the decisions of this Court in asserting that "while the ICC is *permitted* in an acquisition transaction to look beyond a non-carrier subsidiary's independent corporate form in order to prevent evasion of the statute's purpose, the ICC is not *required* to do so where a subsidiary was formed for bona fide business reasons and has sufficient indicia of operational and financial independence." Brief for Federal Respondents at 12 (emphasis in original). This argument is directly contrary to the principles of the *Marshall Transport* line of cases which hold that the ICC is *required* to look beyond the separate corporate status of a subsidiary and to the true nature and practical effects of transactions within its jurisdiction to prevent the use of holding companies and subsidiaries to evade or determine regulation under Section 5, regardless of whether a subsidiary is a bona fide corporation and will operate independently of its parent and affiliates. Thus, in *County of Marin*, this Court held that the ICC erred in assuming Section 5 jurisdiction over a transaction between a parent and a subsidiary because of the nature of the relationship between the parent and the subsidiary and the practical effects of the transaction; indeed, the Court never questioned the corporate bona fides of the subsidiary and specifically did not consider whether there were "financial or operational justifications for the proposed transactions." 356 U.S. at 418.

County of Marin best demonstrates the conflict between the decisions below and the precedent of this Court, for

if the ICC's method of analysis was applied in *County of Marin*, the Commission could have assumed jurisdiction over the operating rights transfer in that case on the basis that the subsidiary was a bona fide corporation under state law and it satisfied the Commission's indicia of independence test. However, the separate corporate status of the subsidiary and its plans to operate independently of its parent were insufficient to treat it as separate from its parent for Section 5 purposes. Whereas *County of Marin* involved the use of a subsidiary to invoke Section 5 jurisdiction, and the instant cases involve the use of subsidiaries to evade Section 5 jurisdiction, the same rule must obviously apply in both situations, especially since *County of Marin* relied upon the principles first established in *Marshall Transport*, which involved an attempt to evade Section 5 jurisdiction.

The Federal Respondents assert an absence of conflict between the decisions below and *Marshall Transport* and its progeny because the parent corporations sought Commission authorization of their continued control of the newly-formed subsidiaries. This assertion is clearly without force because, under the Commission's practice of bifurcating related control and acquisition proceedings, the control decisions focus only on the issue of the parent corporations' common control of more than one carrier, and not on the parent corporations' acquisitions of additional rail lines to extend existing corporate rail systems through the newly-formed subsidiaries. Additionally, this argument is completely at odds with the Commission's holdings that employees of the selling carriers were not covered by the protective conditions imposed in the control proceedings because the selling carriers were not involved in the control proceedings; if the Commission actually authorized the parent corporations' acquisitions of additional rail lines in the control decisions, it could not possibly have held that the sellers of those rail lines were not involved in the control proceedings. Thus, the Commission either failed to apply the principles established in

Marshall Transport, or its holdings that the selling carriers were not involved in the control proceedings were directly contrary to Section 11347.

The fact that a substantial reason for Rail Labor's challenges to these transactions was the denial of statutory employee protective benefits does not mitigate the need for review by this Court to resolve the conflict between its precedent and the decisions below. If a transaction is subject to Sections 11343 and 11344, employee protection arrangements are not a matter of ICC discretion, rather they are mandatory pursuant to Section 11347. Accordingly, the relative merits of requiring such protective arrangements is not a factor in deciding whether a transaction must be approved under those provisions or affirmatively exempted from such approval. However, the fact that a significant purpose of evasion of Sections 11343 and 11344 was to escape Section 11347 employee protection obligations further illustrates the need for strict application of those provisions as is required in *Marshall Transport* and its progeny.[5]

Rail Labor submits that Respondents' observation that two other circuits have affirmed the ICC's view that acquisitions of rail lines by newly-formed controlled entities may be accomplished under Section 10901 does not diminish the force of Rail Labor's showing of a conflict between the decisions below and the precedent of this

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[5] The Federal Respondents' observation that the legislative history of the ICA shows that the scope of Sections 11343 and 10901 was determined prior to the enactment of employee protection requirements so there is no evidence of Congressional intent to make the protections applicable to a broader class of transactions (Brief for Federal Respondents at 12 n.16) is simply irrelevant. It is not Rail Labor's position that these acquisitions must be considered Sections 11343 transactions because employee protections are desirable; rather, Rail Labor contends that the acquisitions are Section 11343 transactions under the language of the statute and precedent of this Court so that employee protective arrangements are therefore mandatory.

Court. Like the court below, neither of those courts of appeals addressed the *Marshall Transport* line of cases. Rail Labor further submits that rather than supporting a denial of Rail Labor's petition, the consistency among the decisions of these courts of appeals actually demonstrates the need for this Court to resolve the conflict between its prior decisions and the reasoning of the courts of appeals.

3. Even if the Commission was not required to treat the acquisitions by FRVR and B&P as acquisitions by carriers, the decisions below still conflict with the *Marshall Transport* line of decisions by holding that CNW and CSXT were not "involved," within the meaning of Section 11347, in the control transactions which were inextricably intertwined with the sales of their lines and which were necessary only because of those line sales. By treating the proceedings on the acquisitions and the control relationships as entirely separate because they were filed under separate Finance Dockets, the Commission simply ignored the true nature and practical effects of those transactions and allowed the form in which the transactions were presented to control the outcome of regulation. However, the Commission was required to look beyond the manner in which the transactions were presented, and its determinations that CNW and CSXT were not involved in the control transactions were in conflict with the principles established in *Marshall Transport*.[6]

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[6] Contrary to the assertions of the Federal Respondents (at 13-14) and the Private Respondents (at 16-17), the fact that various courts of appeals have rejected attempts to apply employee protections imposed in mergers to employees of non-party competitor railroads does not demonstrate the validity of the decisions below or refute Rail Labor's assertions that they conflict with precedent of this Court. The merger cases are easily distinguishable from the instant cases because the selling carriers were clearly involved in the control relationships which were necessitated by the acquisitions, and which made the sales possible. Indeed, Rail Labor's argument

Indeed, those decisions should have carried special force in the context of application of employee protective conditions since Section 11347 is a remedial statute designed to protect employees who are adversely affected by transactions which are subject to ICC approval. As such, Section 11347 should be broadly construed in the context of the overall transaction effected and not be subject to evasion through sophisticated manipulation of the provisions of the ICA. Such machinations can only result in the inequities and inefficiencies which this Court recognized Congress sought to avoid when the "just and reasonable treatment of railroad employees" and the "demands of justice" are ignored. *United States v. Lowden*, 308 U.S. 225, 235-38 (1939).

CONCLUSION

Respondents have not demonstrated an absence of conflict between the decisions below and the precedent of this Court. Rather, their arguments only clarify that conflict and the need for this Court to address the questions raised in Rail Labor's Petition. Accordingly, Rail Labor respectfully submits that the petition should be granted.

Respectfully submitted,

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on this point is that the acquisitions and the control authorizations were essentially single transactions carried out in two steps so that the selling carriers were necessarily involved in the control authorizations.